

## APPELLATE CIVIL.

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*Before Mukherjea J.*

CHARLES DE SA FRAGOSO

*v.*

MEHER ALI\*.

1937  
April 20.

*Second Appeal—Order, in appeal, setting aside sale under s. 174, Bengal Tenancy Act—If appeal lies against—Fraud—Misstatement of value in sale proclamation, if fraud—Bengal Tenancy Act (VIII of 1885), s. 174(5)—Indian Limitation Act (IX of 1908), s. 18.*

There is no Second Appeal against an order setting aside a sale under s. 174 of the Bengal Tenancy Act.

Misstatement of value in a sale proclamation does not amount to fraud within the meaning of s. 18 of the Indian Limitation Act.

*Narayan Sahu v. Damodar Das* (1) followed.

APPEAL FROM APPELLATE ORDER AND CIVIL RULE  
obtained by decree-holder, auction-purchaser.

The appellant obtained a decree for Rs. 138-15-3, in execution of which the property in suit was sold early in 1935. In March, 1935, respondent No. 1, who was a usufructuary mortgagee of a part of the property applied to have the sale set aside on the grounds of fraud and material irregularity by suppression of process. On December 23, 1935, the Munsif dismissed the application on both grounds. On appeal, the Subordinate Judge reversed the order of dismissal on the ground that there had been a gross under-statement of value in the sale proclamation and that amounted to fraud. The decree-holder auction-purchaser appealed against the appellate order and also obtained in the alternative a Rule under s. 115 of the Civil Procedure Code.

\*Appeal from Appellate Order, No. 245 of 1936, from an order of Ramesh Chandra Sen, Subordinate Judge of Dacca, dated Feb. 24, 1936, reversing the order of Nirranjan Banerji, Munsif, Narayanganj, dated Dec. 23, 1935, and Civil Rule under s. 115 of the Civil Procedure Code.

*Charu Chandra Chaudhuri* for the respondent. No Second Appeal lies against an order setting aside a sale under s. 174 of the Bengal Tenancy Act.

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*Beereshwar Bagchi* and *Priya Nath Bhattacharjya* for the appellant. The language of s. 174(5) of the Bengal Tenancy Act is comprehensive and includes a Second Appeal.

Further, this really is a matter within the purview of s. 47 of the Civil Procedure Code and hence there is a Second Appeal. Section 104 and O. XLIII are no bar to a Second Appeal. *Kali Mandal v. Ram-sarbaswa Chakravarti* (1); *Raghubar Doyal Sukul v. Jadunandan Misser* (2).

Lastly, the order appealed against deals with a question of title to the disputed lands and is therefore appealable.

*Biswambar Nama v. Abdul Majid Mea* (3).

*Chaudhuri*, in reply. The under-statement of value was deliberate and fraudulent and the case comes within s. 18 of the Limitation Act.

MUKHERJEA J. This is an appeal preferred by the decree-holder auction-purchaser against the order of the Subordinate Judge, Third Court, Dacca, dated February 24, 1936, by which he reversed the judgment of the Munsif, Second Court, Narayanganj, dated December 23, 1935, and set aside the rent-sale which was held at the instance of the present appellant.

A preliminary objection has been taken to the competency of this appeal by the learned advocate who appears for the respondent and his contention is that no Second Appeal is allowed in law against an order setting aside a sale under s. 174 of the Bengal Tenancy Act. In my opinion, this contention is sound and must prevail. Section 174, cl. (5), lays down that

(1) (1905) I. L. R. 32 Cal. 957.

(2) (1911) 16 C. W. N. 736.

(3) (1935) 40 C. W. N. 95.

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an appeal shall lie against an order setting aside or refusing to set aside a sale. It is contended by Mr. Bagchi appearing for the appellant that the words used here are wide enough to include a Second Appeal. I do not think that that view can be sustained. The first four sub-clauses of s. 174 all relate to proceedings before the original Court and sub-s. (5) is the only sub-section that provides for appeal. The proviso to that section makes it quite clear that the legislature was contemplating only one appeal and no Second Appeal against an order setting aside or refusing to set aside a sale. If sub-s. (5) included a Second Appeal also, it is difficult to say how the provision relating to deposit in Court which is laid down in the proviso can at all be applicable to such cases. I think the legislature intended to give only one appeal against such orders and it was necessary to make that provision, as rr. 89 and 90 of O. XXI of the Code of Civil Procedure were expressly taken away and held to be inapplicable for purposes of this section. The right of appeal is a statutory right and must be conferred by express statute or equivalent authority. I cannot interpret the word "appeal" here as including, by implication, a second appeal also. For these reasons, I am of opinion that the Second Appeal preferred by Mr. Bagchi's client is incompetent. The appeal is accordingly dismissed.

Mr. Bagchi has, however, an alternative application under s. 115 of the Code of Civil Procedure and he has invited me to consider that application on its merits. If there is any irregularity in the exercise of its jurisdiction by the lower appellate Court, I am of course competent to give him relief under s. 115 of the Code of Civil Procedure.

Now the facts of the case lie within a short compass and are, for the most part, undisputed. The decree-holder appellant obtained a rent-decree for a sum of Rs. 135 and odd annas and in execution of that decree put up the holding to sale on December 11, 1934. The sale was confirmed on January 23, 1935, and the

auction-purchaser, who was the decree-holder, took possession on March 5, 1935. On August 31, 1935, the present respondent No. 1 presented this application for setting aside the sale, under the provision of s. 174 of the Bengal Tenancy Act, on the allegation that there were gross irregularities in the matter of publishing and conducting the sale which had resulted in substantial loss to him. The trial Court dismissed this application, holding *inter alia* that the sale processes were duly served and that the application itself being presented more than six months after the date of the sale was hopelessly barred by limitation. It may be said here that the petitioner for setting aside the sale was not the judgment-debtor himself. He purported to be an usufructuary mortgagee with regard to a portion of the holding in arrears. Against the decision of the Munsif an appeal was taken to the lower appellate Court. The lower appellate Court has affirmed the finding of the trial Judge that there was no irregularity in the matter of service of notice and publishing the sale proclamation. He has, however, held that there was a gross under-statement of price of the property in the sale proclamation which has amounted to material irregularity and that as the property was sold for inadequate price, the sale should be set aside. The question of limitation he has got over in this way: He has held first of all that the application is on the face of it barred by limitation and as the petitioner was not the judgment-debtor himself his knowledge was quite immaterial. He has held nevertheless that as there was an under-statement of price in the sale proclamation this amounted to a fraud and once fraud is established, the burden shifts on to the decree-holder to establish in the affirmative that the petitioner had knowledge of this sale. In my opinion, the lower appellate Court has really misdirected himself both on the question of law and on the question of facts and has exercised its jurisdiction illegally and with material irregularity. It is true that if a fraud of that nature is once established, which is sufficient to bring the case within the

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purview of s. 18 of the Limitation Act, the burden would shift on to the decree-holder and it would be for him to show as to when the influence of fraud ceased. But mis-statement of value, even if it is described as fraud, does not constitute fraudulent concealment and by itself does not bring the case within the purview of s. 18 of the Limitation Act. *Narayan Sahu v. Damodar Das* (1). I think, therefore, that the Court of appeal below was not right in holding that the burden was upon the decree-holder here to establish that the petitioner had knowledge of the sale. Even apart from this, I think the appellant has a stronger case. The trial Court was of the opinion that the judgment-debtor was aware of the proceedings throughout. This finding has not been reversed in appeal. Furthermore, the lower appellate Court remarks in its judgment that a sister of the respondent No. 1, who was a wife of one of the judgment-debtors, herself made an attempt to purchase the property and offered bids and these circumstances might give rise to a suspicion that even the respondents themselves were aware of the proceeding throughout. As I have said already, the knowledge or ignorance of the respondent is not at all material. I think that in the circumstances of this case there has been a clear irregularity in the exercise of the jurisdiction by the lower appellate Court and he should not have reversed the decision of the trial Judge with whose finding relating to the due publication of the sale proclamation and due service of processes he agreed.

The result, therefore, is that this application under s. 115 of the Code of Civil Procedure is allowed, and the order of the lower appellate Court is set aside and that of the Court of first instance is restored.

I make no order as to costs in this appeal.

*Appeal dismissed, application allowed.*

S. M.