CIVIL REVISION.

Before Edgley J.

ABUL JAMIL SAMSUL HAMID CHAUDHURI

1939

April 4, 5.

v.

AMBIA KHATUN.*

Sale—*Sale, Setting aside of—Fraudulent concealment, Elements of—Time-barred application, when can be entertained—Onus—Code of Civil Procedure (Act V of 1908), O. XXI, r. 20—Indian Limitation Act (IX of 1908), s. 18.*

When a judgment-debtor files a time-barred application to set aside a civil Court sale and seeks to invoke the aid of s. 18 of the Indian Limitation Act, the initial onus will lie upon him to show that, by reason of fraudulent concealment on the part of the person against whom he has made the application, he has been kept from the knowledge of his right to file it.

Mere under-valuation of property in the sale-proclamation cannot possibly amount to the fraudulent concealment which is required under s. 18 of the Indian Limitation Act. It is a matter which, along with other matters, may be considered, but by itself it is not sufficient to enable the judgment-debtor to get the benefit of that section. The element of fraudulent concealment as stated above also requires to be established. It is only when this is done that the burden is shifted on to the other side to show that the applicant had knowledge of the transaction beyond the period of limitation. Such knowledge must be clear and definite knowledge of the facts constituting the particular fraud. It is not sufficient for the opposite party to show that the applicant had some clues and hints which perhaps, if vigorously followed, might have led to a complete knowledge of the fraud.

Rahimbhoy Habibbhoy v. *Turner* (1) explained.

Ramizaddin Basar v. *Naimaddi Basar* (2) dissented from.

Bajrang Prasad Singh v. *Sonejhari Kuer* (3); *Narayan Sahu* v. *Mohanth Damodar Das* (4); *Charles de Sa Fragoso* v. *Meher Ali* (5) and *Biman Chandra Datta* v. *Promotha Nath Ghose* (6) relied on.

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The material facts of the case and the arguments in the Rule appear sufficiently from the judgment of the Court.

*Civil Revision, No. 1560 of 1938, against the order of S. K. Ganguli, Fourth Additional District Judge of Bakarganj, dated Aug. 5, 1938, reversing the order of Abul Kasem Khan, Sixth Munsif of Barisal, dated Feb. 2, 1938.

(1) (1892) I. L. R. 17 Bom. 341; L. R. 20 I. A. 1.
(2) (1932) 56 C. L. J. 570.
(3) [1925] A. I. R. (Pat.) 521.
(4) (1912) 16 C. W. N. 894.
(5) I. L. R. [1937] 2 Cal. 496.
(6) (1922) I. L. R. 49 Cal. 886.

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Jitendranath Guha and *Satyapriya Ghosh* for the petitioner.

Radhikaranjan Guha for the opposite party.

EDGLEY J. This Rule is directed against the order of Mr. S. K. Ganguli, Additional District Judge of Bakarganj, dated August 5, 1938, under which he set aside a civil Court sale which had been held on December 17, 1934. Some two and a half years after the date of the sale, opposite party No. 1 in this case applied to have the sale set aside on the ground of fraudulent suppression of the processes and for irregularities connected with the publication of the sale. Her application was rejected by the trial Court. She then appealed and her appeal was heard in due course by the learned Additional Judge who reversed the decision of the trial Court and set aside the sale.

It may be mentioned that there was some discussion in the Courts below on the question whether the sale with which we are dealing was one under the Bengal Tenancy Act or a sale under the provisions of the Code of Civil Procedure. It is, however, now admitted that, in view of the circumstances of the case, it must be treated as a sale under the provisions of the Code of Civil Procedure and that the application to set aside the sale will be governed by O. XXI, r. 90 of the Code. It is further admitted that, as the application to set aside the sale was filed on July 5, 1937, while the sale was held on December 17, 1934, the judgment-debtors' application must be treated as time-barred unless she can get the benefit of s. 18 of the Indian Limitation Act.

The general line of reasoning adopted by the learned Additional Judge is somewhat obscure. He found, however, that two plots of the judgment-debtors' property were valued respectively in the sale proclamation at Rs. 10 and Rs. 40 and were sold for Rs. 10 and Rs. 70. He also appears to have been

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of the opinion that the proper value of this property was at least Rs. 2,100 and he held that the fact of this under-valuation amounted to clear evidence of fraud on the part of the decree-holder. He was, therefore, of opinion that the onus lay on the decree-holder to show that opposite party No. 1 was not entitled to the benefit of s. 18 of the Indian Limitation Act. The whole of his subsequent discussion of the evidence appears to have been coloured by this opinion and he failed to consider the question as to whether the initial onus to prove fraudulent concealment lay upon opposite party No. 1. In view of the findings contained in the judgment of the learned Additional District Judge, to which reference has been made above, it appears that he proceeds on the assumption that, in a case in which there is evidence of fraud in connection with the valuation of the property sold, a judgment-debtor, who applies after the prescribed period of limitation to have the sale set aside, becomes automatically entitled to a presumption to the effect that, owing to fraud on the part of the decree-holder, he has been kept from the knowledge of his right to file an application to have the sale set aside, and that the onus will lie entirely upon the decree-holder to rebut this presumption. In my opinion this assumption is erroneous.

Section 18 of the Limitation Act provides that

> Where any person having a right to institute a suit or make an application has, by means of fraud, been kept from the knowledge of such right or of the title on which it is founded * * * *
>
> the time limited for instituting a suit or making an application against the person guilty of the fraud or accessory thereto * * * * *.
>
> shall be computed from the time when the fraud first became known to the person injuriously affected thereby * * * * * *.

It follows, therefore, from the clear language of the section, that a person, who makes an application after the ordinary statutory period of limitation, must prove that he has been kept from the knowledge of his right to make the application by the fraud of

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the person against whom the application is directed. In other words, the initial onus lies upon him to prove the requisite element of fraudulent concealment. In a case, therefore, in which an applicant is seeking under O. XXI, r. 90 of the Code of Civil Procedure to set aside a civil Court sale, if his application has been filed more than thirty days after the date of the sale, he will have to prove fraudulent concealment on the part of the decree-holder or such other person against whom his application may be directed. If by doing so he establishes his right to file a time-barred application, it will then be for him to prove fraud or irregularity in publishing or conducting the sale, within the meaning of O. XXI, r. 90 of the Code of Civil Procedure, sufficient to enable him to have the sale set aside under that rule.

In support of the view, which has been taken by the learned Additional Judge in this matter, reliance is placed by the learned advocate for the opposite party on certain observations made by the Judicial Committee of the Privy Council in the case of *Rahimbhoy Habibbhoy* v. *Turner* (1). That case related to a suit brought in 1887 by the Official Assignee in respect of some property, which, according to the allegations in the plaint, had been fraudulently transferred in 1867 by an insolvent to his brother, Rahimbhoy Habibbhoy. Their Lordships held that the transfer was a voluntary one and bad against the creditors, and, further, that it was committed in pursuance of fraud and was concealed from the creditors. They also held that

> it was a fraud which prevented the Assignee from having knowledge of his right to recover the assets, and, therefore, falls within the 18th section of the Limitation Act XV of 1877, which directs that in such a case the time for instituting an action shall be computed from the time when the fraud first became known to the person injuriously affected thereby.

Lord Hobhouse, who delivered the judgment in the case, then went on to discuss the question as to

(1) (1892) I. L. R. 17 Bom. 341 ; L. R. 20 I. A. 1.

the date when the Official Assignee obtained knowledge of the fraud and, in this connection, His Lordship made the following observations :—

> Their Lordships consider that when a man has committed a fraud, and has got property thereby, it is for him to show that the person injured by his fraud and suing to recover the property has had clear and definite knowledge of those facts which constitute the fraud, at a time which is too remote to allow him to bring the suit. That is attempted in the present case.

On the point as to the time when knowledge of the fraud came to the knowledge of the Official Assignee, there was a finding to the effect that certain clues and hints reached him in 1881 which possibly, if followed up, might have led to a complete knowledge of the fraud, but with regard to this matter Lord Hobhouse observed :—

> Their Lordships cannot consider that this is such knowledge on the part of the Assignee as would deprive him of the benefit of the 18th section of the Limitation Act. They, therefore, consider that the action is brought in good time, being brought within two years after the real knowledge came to the mind of the Assignee.

It is significant that in the case cited above their Lordships of the Judicial Committee first came to a finding to the effect that fraud had actually been committed, which prevented the Assignee from having knowledge of his right to recover the assets and that their subsequent observations with regard to the question of the onus which lay upon the party who had committed the fraud related to the question as to the time when the fraud actually came to the knowledge of the Assignee. As I understand the principles which may be deduced from the decision of the Judicial Committee in the case of *Rahimbhoy Habibbhoy* v. *Turner* (*supra*), they are to the effect that, in a case such as that with which their Lordships were dealing, it must first be established by the plaintiff that there was fraudulent concealment on the part of the defendant. With regard to this point, the onus would lie on the plaintiff. When once the fraudulent concealment has been established, the question would then have to be examined as to the time when this particular fraud

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became known to the plaintiff. With reference to the second point, the onus would lie on the person responsible for the fraudulent concealment, to show that, in spite of this fraud, the facts relating thereto had become known to the plaintiff before the alleged date of knowledge, at a time too remote to allow him to bring the suit. The correct legal position in this matter has been very clearly summarised by Mookerjee J. in the case of *Biman Chandra Datta* v. *Promotha Nath Ghose* (1) as follows :—

> The true position then is that where a suit is on the face of it barred, it is for the plaintiff to prove in the first instance the circumstances which would prevent the statute from having its ordinary effect. A person who, in such circumstances, desires to invoke the aid of s. 18, must establish that there has been fraud and that by means of such fraud he has been kept from the knowledge of his right to sue or of the title whereon it is founded. Once this is established, the burden is shifted on to the other side to show that the plaintiff had knowledge of the transaction beyond the period of limitation. Such knowledge must be clear and definite knowledge of the facts constituting the particular fraud ; as Lord Hobhouse points out, it is not sufficient for the defendant to show that the plaintiff had some clues and hints which perhaps, if vigorously and acutely followed up, might have led to a complete knowledge of the fraud.

It, therefore, follows that, when a judgment-debtor files a time-barred application to set aside a civil Court sale and seeks to invoke the aid of s. 18 of the Indian Limitation Act, the initial onus will lie very heavily upon him to show that, by reason of fraudulent concealment on the part of the person against whom he has made the application, he has been kept from the knowledge of his right to file the application. In the matter with which we are now dealing, therefore, it is not merely necessary to show that fraud has been committed in order to enable the judgment-debtor to get the benefit of s. 18 of the Limitation Act but the element of fraudulent concealment requires to be established. From this point of view, in my opinion, it certainly cannot be said that mere under-valuation of property in the sale proclamation can possibly amount to the fraudulent concealment which is required under s. 18 of the Limitation Act. It is a matter which, along with

(1) (1922) I. L. R. 49 Cal. 886, 891.

other matters, may be considered, but, in order to establish fraudulent concealment, it would be necessary to show that, through the fraudulent conduct of the decree-holder or such other person against whom the application has been directed, the judgment-debtor had been prevented from having any knowledge of the sale proclamation or the fact that a sale had actually taken place. In other words, as stated by Das J. in the case of *Bajrang Prasad Singh* v. *Sonejhari Kuer* (1)—

> In order to succeed the judgment-debtor must establish that there was some contrivance on the part of the decree-holder by which the judgment-debtor was kept from the knowledge of her right to apply under O. XXI, r. 90 of the Code of Civil Procedure. It is, in my opinion, not sufficient, to say that, as there was fraud in the conduct of the sale, therefore, it must follow that there was a contrivance on the part of the decree-holder to keep the judgment-debtor from the knowledge of the fraudulent sale.

This is also the view which seems to have been taken by Sir Lawrence Jenkins C.J. in the case of *Narayan Sahu* v. *Mohanth Damodar Das* (2). In that case his Lordship observed that—

> The mis-statement of the value in the execution petition is described as a "fraud and irregularity"; irregularity it may have been; and, even assuming for the sake of argument that it was a fraud, still it does not constitute the fraudulent concealment necessary to save limitation. Even if the non-publication of the sale proclamation in the *mofussil* exposed the sale to attack at the instance of the judgment-debtor, it is not shown that he has by means of fraud, of which the decree-holder was guilty or to which he was accessory, been kept from the knowledge of his right.

A similar view was also expressed by Mukherjea J. in the case of the *Charles de Sa Fragoso* v. *Meher Ali* (3).

The learned Additional Judge in the Court below mainly bases his judgment on the decision of Mitter J. in the case of *Ramizaddin Basar* v. *Naimaddi Basar* (4). That was a case in which certain persons sought to set aside a sale under the provisions of s. 174 of the Bengal Tenancy Act. Their application would have been clearly time-barred unless the applicants could show that they were entitled to the

(1) [1925] A. I. R. (Pat.) 521, 522.
(2) (1912) 16 C.W.N. 894.
(3) I. L. R. [1937] 2 Cal. 496.
(4) (1932) 56 C. L. J. 570, 572.

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benefit of s. 18 of the Limitation Act. The sale was set aside by the first Court, but this decision was reversed on appeal by the District Judge on a finding that there had been no fraudulent suppression of the sale proclamation as alleged. The judgment-debtors then moved this Court in revision. Mitter J. found that the District Judge had failed to consider the fact that the property sold had been grossly undervalued in the sale proclamation. In this connection Mitter J. observed :—

> This is of a class of cases where the statement of the inadequate value is so great, as has been said by a distinguished English Judge, as to shock the conscience. This itself, as I have pointed out in another case, namely, *Bhairab Chandra Sinha* v. *Kalidhan Roy Choudhury* (1) is valuable evidence of fraud, and no Court would be justified in circumstances like these to uphold a sale which offers clear evidence of fraud on the part of the decree-holders.

In that view of the case, the learned Judge held that the onus lay upon the auction-purchaser to establish that the person injured by the fraud had clear and definite knowledge of those facts which constituted the fraud at a time too remote to allow him to make the application. In other words, Mitter J. intended to apply the principle laid down by the Judicial Committee in the case of *Rahimbhoy Habibbhoy* which has already been discussed. The learned Judge, however, did not consider the necessity which lay upon the applicants to discharge the initial onus as regards fraudulent concealment for the purpose of getting the benefit of s. 18 of the Indian Limitation Act and, this being the case, I do not think it can be said that the decision in *Ramijaddin's* case (*supra*) falls within the principle which was laid down by the Privy Council in *Rahimbhoy Habibbhoy's* case and was reiterated by Sir Lawrence Jenkins, Chief Justice, in the case of *Narayan Sahu* v. *Mohanth Damodar Das* (*supra*) and by Mookerjee J. in the case of *Biman Chandra Datta* v. *Promotha Nath Ghose* (*supra*).

(1) (1928) 33 C.W.N. 569.

A Court may be perfectly justified in setting aside a sale in a proper case established on an application filed within the prescribed period of limitation where the Court is satisfied that the property sold was grossly undervalued : *Saadatmand Khan* v. *Phul Kuar* (1). Civil Court sales should not, however, be lightly set aside and, even in a case in which no question of limitation arose, the Court would necessarily demand a high standard of evidence to prove that there had been fraud or irregularity in publishing or conducting the sale on account of under-valuation. *A fortiori* mere proof of under-valuation would certainly not be sufficient to enable an applicant to succeed on a time-barred application. The initial point to be considered in such a case is not whether fraud was committed in publishing or conducting *the sale*, but whether fraud was committed on the applicant to set aside the sale by concealing from him his right to apply to have the sale set aside. The nature of the fraud which has to be proved is, therefore, essentially different in the two cases. This aspect of the matter appears to have been overlooked by Mitter J. in the case of *Ramizaddin Basar* v. *Naimaddi Basar* (*supra*) and I am not, therefore, prepared to accept his decision in that case as containing a correct statement of the law with reference to this matter.

It follows, therefore, that in my view the learned Additional District Judge has misplaced the initial onus which lay upon the applicant and, in these circumstances, the matter will require further consideration.

Having regard to the facts which are alleged in the case with which we are now dealing, it should first be considered whether or not the applicant has been able to show that, by reason of any fraudulent concealment on the part of the decree-holder, she was kept from the knowledge of her right to file an

(1) (1898) I. L. R. 20 All. 412 ; L. R. 25 I. A. 146.

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application to have the sale set aside. In considering this matter it will, of course, be open to the Court below to see whether there was, in fact, any gross under-valuation of the property in the sale proclamation and if such under-valuation is established,—the question would then naturally arise whether the opposite party was afforded an opportunity to attend at the drawing up of the proclamation or whether by reason of the conduct of the decree-holder the facts connected with the publication and conduct of the sale were fraudulently kept from her knowledge. If these initial facts are established in favour of the judgment-debtor the onus will then lie upon the decree-holder to show that the judgment-debtor actually had knowledge of the facts constituting the fraud before the alleged date of knowledge, that is, June 13, 1937, and that in these circumstances and having regard to the actual time when the fraud came to her notice, the application should be treated as time-barred.

In view of what I have stated above, the Rule must be made absolute, the decision of the learned Additional District Judge must be set aside and the case is remanded to the Court below for reconsideration in the light of the observations made in this judgment.

Costs will abide the result. The hearing-fee in this Court is assessed at three gold *mohurs*.

Rule absolute. Case remanded.

A. C. R. C.