APPELLATE CIVIL.

Before Mr. Justice Miller, Mr. Justice Sankaran-Nair and Mr. Justice Abdur Rahim.

1908. September 15. October 23. December 18. 1909. January 12.

THATHU NAICK AND OTHERS (PLAINTIFFS NOS. 2 TO 4 AND SECOND PLAINTIFF'S LEGAL REPRESENTATIVES), APPELLANTS,

v.

KONDU REDDI AND OTHERS (DEFENDANTS AND LEGAL REPRESENTATIVES OF THE FIRST DEFENDANT), RESPONDENTS.*

Civil Procedure Code, Act XIV of 1882, ss. 244, 294—Confirmation of sale no bar to set aside sale in contravention of s. 294—Plaint or written statement in Court executing decree may be treated as application under s. 244—Burden of proof in suit to set aside sale.

The holder of a mortgage decree brought the mortgaged property to sale in execution. He applied to the Court for permission to bid at the sale, and the Court granted him permission, fixing an amount as the minimum at which he was to bid. The decree-holder purchased the property at sale by Court in the name of a third party for a sum far less than the minimum fixed by the Court and less than the principal amount secured by the mortgage. The sale was confirmed and possession delivered to the purchaser, but actual possession remained with certain parties who had purchased the property from the original mortgagor.

In a suit brought by the decree-holder and auction-purchaser, as plaintiffs in the Court which executed the decree, against the original mortgagor, and the purchasers from them as defendants, the defendants who discovered the fraud of plaintiffs subsequent to the confirmation of sale, contended that the sale of plaintiffs was fraudulent and contrary the to provision of section 294 of the Code of Civil Procedure:

Held (1) that the confirmation of the sale was no bar to enforcing the right of defendants to set aside the sale, the fraud having been discovered only after such confirmation.

Held, also *per* MILLER and SANKARAN-NAIR, JJ. (ABDUR RAHIM, J., dissenting) that it was open to the defendants to have the sale set aside in the suit by way of answer to the plaintiff's claim

Per ABDUR RAHIM, J.—The sale cannot be set aside except on an application by defendants under sections 294 and 244, Civil Procedure Code, to the Court executing the decree.

Per SANKARAN-NAIR, J.—A plaint a suit, in the Court executing the decree may be treated as an application under section 244 of the Code of Civil

* Second Appeal No. 847 of 1905.

Procedure. So also a written statement, containing an answer to the plaintiff's claim may be treated as an application under section 244.

Where a decree-holder purchases property in contravention of section 294, the judgment-debtor, seeking to set aside the sale, need not prove or allege fraud or that the property was sold at an undervalue In such a case, and especially where the purchase money is less than the amount advanced on the land, it is for the decree-holder to show that the sale should be upheld.

Per MILLER and ABDUR RAHIM, JJ.—The bare fact that the sale was in contravention of section 294 is not sufficient to set aside the sale as fraudulent. It must be shown that loss resulted to some one in consequence.

Mahomed Gazee Chowdhry v. *Ram Loll Sen*, [(1881) I.L.R., 10 Calc., 757], followed.

Bhiram Ali Shaik Shikdar v. *Gopi Kanth Shaha*, [(1897) I.L.R., 24 Calc., 355], followed.

SECOND APPEAL against the decree of W. W. Phillips, District Judge of Tinnevelly, in Appeal Suit No. 274 of 1904, presented against the decree of T. Krishnaswami Naidu, District Munsif of Satur, in Original Suit No. 152 of 1903.

The facts of the case are fully stated in the judgments of Miller and Abdur Rahim, JJ.

S. Srinivasa Ayyangar for the Hon. Mr. *V. Krishnaswami Ayyar* for second and fourth appellants.

K. N. Aiya for fourth and fifth respondents.

JUDGMENTS (MILLER, J.).—The first plaintiff sues for the recovery of property purchased by him at a Court-sale in execution of a mortgage decree obtained by himself The principal money due being Rs. 750 he obtained permission to bid at the sale to an amount not less than Rs 1,500. The sale was held but neither he nor any one else made any bid: a month or two later another sale was held but again the property was not sold: at the third sale without asking for permission to bid he purchased in the name of the second plaintiff for a sum considerably less than the principal money due on the mortgage. The sale was confirmed and possession delivered to the second plaintiff under section 319, Civil Procedure Code. The plaint alleges that delivery was under section 318, and the delivery order and receipt are not on the record, but I take it for the purposes of this judgment, paragraph 12 of the plaint being ambiguous, that the fourth and fifth defendants are purchasers from the judgment-debtors pending the plaintiff's suit on his mortgage and have retained actual possession of the land ever since their purchase. The first plaintiff now sues to recover the land from them, and they resist him on several

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grounds of which one only has been dealt with by the Courts below. They have dismissed the suit, holding that the sale to the first plaintiff is void by reason of his having fraudulently purchased the property through the second plaintiff for a smaller sum than he must have paid had he, acting on the permission given him by the Court, bid at the auction in his own name or openly by an agent.

I must assume that the fourth and fifth defendants did not know the truth before the institution of the present suit, and that the Court executing the decree was equally in the dark.

These being the facts I may clear the ground by stating that I do not think the fact that the sale has been confirmed affects the case. At the time of confirmation neither the judgment-debtors nor the Court had notice of any fact which would have caused the latter to refuse confirmation, and their ignorance was due to deceit practised by the decree-holder-purchaser.

The purchase being effected in contravention of the provisions of section 294, the sale is voidable, in the discretion of the Court, on the application of any person interested in it, and I have no doubt that the fourth and fifth defendants, who are, *ex-hypothesi*, bound by the decree, are persons interested in the sale.

The appellants contend that under section 294 the execution Court alone can exercise the powers conferred by the section and as the sale has not been set aside by that Court the respondents have no defence. It is also contended that section 244 of the Code bars the defence; and that the decision on the ground of fraud is bad in the absence of an allegation of fraud in the written statement of the fourth and fifth defendants.

The second contention is, I think, unsound. *Bhiram Ali Shaik Shikdar* v. *Gopikanth Shaha*(1) and *Venkataramachariar* v. *Meenatchisundram Ayyar*(2) in this Court are authorities to the contrary, and I am unable to accept the view pressed upon us in the able argument addressed to us on behalf of the appellants, that the words, "by a separate suit" in section 244 are equivalent to "in a separate suit whether the question is raised by the plaintiff or the defendant." I prefer the view taken by the Calcutta High Court that the section "bars a suit brought for the determination of certain questions, but does not bar the trial of an issue involved in those questions, if the issue is raised at the

(1) (1897) I.L.R., 24 Calc., 355 at p. 357.
(2) (S.A. No. 616 of 1903 (unreported)

instance of a defendant in a suit brought against him" As was pointed out in *Venkataramachariar* v. *Meenatchisundram Ayyar*(1) this view tends to prevent multiplicity of proceedings, and it also avoids the necessity of compelling a defendant to raise in the execution Court questions which it may be entirely unnecessary to agitate so long as he is left in peaceable possession of his property. In the present case it is obviously more convenient to try the question in the present suit, than to stay proceedings and refer the fourth and fifth defendants to an application to the execution Court, the execution of the decree having been, so far as they are concerned, closed long ago with the delivery of possession to the second plaintiff.

The first contention amounts to this: though the execution Court could, if it thought fit, set aside the sale, the Court trying this suit cannot do so, and cannot therefore refuse to enforce it. In *Mahomed Gazee Chowdhry* v. *Ram Loll Sen*(2), the Court did refuse to enforce a sale in similar circumstances, but it is argued that decision ought not to be followed.

It seems to me, however, that that decision is right: assuming fraud on the part of the first plaintiff what he in effect asks the Court to do is to aid him in bringing his fraud to a successful issue. By deceiving the execution Court and the judgment-debtors he has obtained for himself an advantage over the latter which he would not have obtained had the Court known the truth: and because he has been able ever since to keep the truth from the knowledge of the judgment-debtors and the fourth and fifth defendants, the Court must, he claims, give him a decree now. I cannot believe that it is the duty of the Court knowingly to accept the position of an instrument of fraud, and that too when the fraud has been practised upon itself or upon another Court which is practically the same thing. We might no doubt stay proceedings and give the judgment-debtor an opportunity of applying to the execution Court, but that would be, I think, an unnecessarily circuitous method of procedure.

But it has to be remembered that fraud means more than mere trickery. The first plaintiff has deceived the execution Court: knowing that that Court would not give him permission to buy the land for Rs. 436, he has set up the second plaintiff to buy it for

(1) S.A. No. 616 of 1903 (unreported). (2) (1884) I.L.R., 10 Calc., 757.

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him: he has thus by his deceit obtained an advantage for himself, but at whose expense? If he has paid its full value for the land no one is the loser by his trick and the sale will be maintained. (*Mathura Dass* v. *Nathuni Lall Mahta*(1).) It matters not to the judgment-debtors who buy the land provided it fetches its full value at the sale.

This brings me to the third contention that no fraud was alleged or proved In the written statement of the fourth and fifth defendants, and in the additional written statement of the fourth defendant all that is said is that the sale is invalid because the first plaintiff was the real purchaser through the second plaintiff, and had no permission to bid. It is nowhere alleged that the price realised was insufficient.

Nevertheless the District Munsif taking into consideration the fact that the purchase price was less than the amount lent on mortgage on the land has held that the first plaintiff has defrauded the judgment-debtors by purchasing at an under value *benami*. No other injury to the judgment-debtors is suggested. The eighth issue, the only one decided, does not raise this question, but having regard to the undoubted facts, the fact that the fourth and fifth defendants are not the actual debtors (though it may be that they are bound by the decree) and may possibly not have been aware of the amount realized at the sale, the fact that the first plaintiff must have known that except by a trick he could not have obtained leave to bid for so little as Rs. 436, and the fact that that sum is but little more than half the principal mortgage money—having regard to all these facts I have come to the conclusion that we ought to allow the issue to be tried now.

I would frame it thus and ask the lower Appellate Court to return a finding on it:—"Has the first plaintiff by deceiving the Court and the judgment-debtors become the purchaser of the land in question, for less than its true value at the date of the sale?" If he has, it seems to me, he has been guilty of a fraud upon the Court and the judgment-debtors and the Court will not lend him its assistance.

As my learned brother differs, and neither of us is prepared to dismiss the appeal, we will lay the case before the learned Chief Justice for reference to a third Judge.

(1) (1885) I.L.R., 11 Calc., 731.

ABDUR RAHIM, J.—The first plaintiff in the suit in which this second appeal has arisen bought at a Court auction sale held on the 8th March 1901 the property which he now seeks to recover from the defendants, in the name of the second plaintiff but for his own benefit. The sale which was effected in execution of a mortgage decree for Rs. 1,632-7-0 obtained by the first plaintiff in Original Suit No. 368 of 1899 on the file of the District Munsif's Court of Satur against the defendants Nos. 1 and 2 was confirmed on the 12th April 1901 and the second plaintiff the apparent purchaser also obtained symbolical delivery of possession but did not succeed in obtaining actual possession of the property. Before the sale of the 8th March 1901, there had been two infructuous attempts at sale one on the 12th October 1900 and the other on the 18th January 1901, on both of which occasions there was no bidder. At the third sale the second plaintiff was the only bidder and the property was knocked down to him for Rs. 436. On the 1st September 1900, that is, before the first infructuous sale the first plaintiff had applied under section 294, Civil Procedure Code, for leave to bid and obtained it on condition that he was to commence his bids at Rs. 1,500, namely, twice the principal amount secured by his mortgage. So far as it appears this limit was fixed without any reference to the value of the property. The defendants Nos. 4 and 5 bought the property from the defendants Nos 1 and 2 during the pendency of the mortgage suit, Original Suit No. 368 of 1899 and are therefore bound by the decree in that suit and would have the same right to impeach the sale as defendants Nos. 1 and 2.

Both the lower Courts dismissed the plaintiff's suit holding on the authority of *Mahomed Gazee Chowdhry* v. *Ram Loll Sen*(1) that the plaintiff purchased the property by means of fraud practised on the Court and therefore his purchase was void and of no effect in law. The learned pleader for the plaintiff who are the appellants in the Court argues that in the first place the lower Courts were not entitled to find a case of fraud as no fraud was at all alleged in the written statements, nor was any issue framed raising the question. There can be no doubt it seems to me that the rule is well established that a party relying upon fraud either as the basis of his action or as defence to a suit must plead it in distinct

(1) (1884) I.L.R., 10 Calc., 757.

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terms so that the party whose act is impeached as fraudulent may have full notice of the charge he has to meet. This proposition is emphatically enunciated in *Mahomed Mira Ravuthar* v. *Savvasi Vijaya Raghunadha Gopalan*(1), where their Lordships of the Privy Council strongly protest against the propriety of the Appellate Court entertaining a case of fraud other than the one specifically alleged in the pleadings. Here though the question of fraud is discussed in the judgment of the Munsif it does not appear that the plaintiffs were invited to go to trial on that question and in their grounds of appeal to the Lower Appellate Court they protested against the Munsif considering any case of fraud. But it is said that the facts which are found in this case to constitute fraud are all admitted and as fraud has been inferred from those facts merely as a conclusion of law the plaintiffs can have nothing to complain of. But I am not sure that this is so. In my opinion the admitted facts of this case such as they are did not preclude the necessity of pleading fraud in express terms, because the first plaintiff might for instance be able to show if a proper opportunity were given to him that the judgment-debtors agreed to his bidding for the property in the name of the second plaintiff for Rs. 436 or that the judgment-debtors subsequently to the sale and with full knowledge of the facts ratified or acquiesced in the purchase made by the first plaintiff. All that was, in fact, pleaded was that the purchase was made without permission of the Court and therefore could not be enforced.

Now do the facts which I have stated make out that there was fraud vitiating the sale? The fact that the first plaintiff bought the property through the second plaintiff does not in itself constitute fraud even although he did no without disclosing it to the Court holding the sale and with the object of evading the necessity of obtaining the Court's leave under section 294, Civil Procedure Code. What he did so doubt amounted to a violation of the statutory rule as enacted in section 294, Civil Procedure Code, and that section itself lays down the penalty for his so buying the property, namely, that the Court may, if it so chooses, set aside the sale on an application being made to that effect by the judgment-debtor. The restriction imposed on a decree-holder buying the property of the judgment-debtor in execution of his decree

(1) (1900) I.L.R., 23 Mad., 227 at p. 237.

is the creation of a statute and when we find that the same statute has provided a penalty for the violation of such restriction I think it is according to a sound canon of construction that the penalty should be regarded as co-extensive with the disobedience of the restriction. What I mean is that the Court cannot attach to the disregard of a rule like this consequences other than that contemplated by the legislature by converting such a disregard into fraud. In *Mahomed Mira Ravuthar* v. *Savvasi Vijaya Raghunadha Gopalan*(1), the Judicial Committee of the Privy Council point out that in this country where the reponsibility for conducting the sale devolves entirely on the Court the necessity for obtaining its permission to bid cannot be said to impose the same obligations on the decree-holder wanting to buy the property as in England where the decree-holder, has generally the conduct of the sale. The cases referred to, namely, *Javherbai* v. *Haribhai*(2), *Chintamanrav Natu* v. *Vithabai*(3), *Paramasiva* v. *Krishna*(4), *Martand* v. *Dhondo*(5) and *Mathura Das* v. *Nathuni Lall Mahta*(6), are clear authorities, if any such were needed, showing that such a purchase as is under consideration is not void but creates a good legal title in the buyer unless and until the sale is set aside according to the provisions of section 294, Civil Procedure Code.

The next question is, does the fact that the first plaintiff had applied before the first infructuous sale for leave to bid and obtained it on condition that he was not to bid less than Rs. 1,500 make any difference. In my opinion it does not. In this connection I would suppose that the conditional leave continued in force at the time of the third sale (see *Coaks* v. *Boswell*(7)) at which he actually bought the property for Rs. 436—a sum considerably less than Rs. 1,500. But the leave which was granted to the first plaintiff cannot be said to have the effect of a binding agreement on his part to buy the property for at least Rs. 1,500. If he was then at liberty to avail himself or not of the leave as granted, his buying the property for Rs. 436 would only show that he bought it without availing himself of such leave. I fail to see therefore why the first plaintiff buying the property at the

(1) (1900) I.L.R., 23 Mad., 227 at p. 237. (2) (1881) I.L.R., 5 Bom., 575.
(3) (1887) I.L.R., 11 Bom., 588. (4) (1891) I.L.R., 14 Mad., 498.
(5) (1898) I.L.R., 22 Bom., 624 at p. 628. (6) (1885) I.L.R., 11 Calc., 731.
(7) (1886) 11 App., Cas., 232 at p. 242.

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third sale for a sum less than Rs. 1,500 should be in a worse legal position than he would be if he had obtained no leave at all.

I may again refer to *Mahomed Mira Ravuthar* v. *Savvasi Vijaya Raghunadha Gopalar*(1) as showing that the Court should not be hasty in inferring fraud but should, on the other hand, construe strictly and narrowly all charges of fraud. Here the Court holding the sale was quite willing to conclude the bargain for Rs. 436 with the second plaintiff and the fact the latter bought really for the first plaintiff who had not obtained leave of the Court to buy for that amount cannot be said to vitiate the contract itself. In *Mahomed Gazee Chwdhry* v. *Ram Loll Sen* (2), however, a different view prevailed and that case was subsequently followed in *Srimati Sarat Kumari Debi* v. *Nimai Charm Dely Sircar*(3). In both these cases, the circumstances of which were similar, the learned Judges were of opinion that the conduct of the decree-holder who bought the judgment-debtor's property amounted to an abuse of the process of the Court and therefore disentitled him to the assistance of the Court in enforcing that purchase. But with the greatest deference to the learned Judges who decided those cases I do not see how, if the Court sale passed a leagal title subject to its being defeated by an order of the executing Court setting aside the sale, the Court can refuse to recognize his legal title. It is not the case of a plaintiff seeking an equitable relief so that the Court may refuse to grant it in the exercise of its discretion upon one of the well-known principles which guide the exercise of equity jurisdiction. I may also remark that so far as I am aware the phrase "abuse of the process of the Court" is generally used in connection with actions for using some process of the Court, such as, for instance, a writ of attachment taken out maliciously to the injury of another person, and I do not think that the employment of that phraseology helps in any way to indicate the legal effect of a purchase such as this or the legal force of the judgment-debtor's plea in resisting a suit for ejectment.

I am thus of opinion that the sale not having been set aside under section 294, Civil Procedure Code, the plaintiffs are entitled

(1) (1900) I.L.R., 23 Mad., 227 at pp. 232-234.
(2) (1884) I.L.R., 10 Calc., 757. (3) 5, C.W.N., 265.

to recover possession of the property from the defendants. But it has been argued on the authority of the case of *Bhiram Ali Shaik Shikdar* v. *Gopi Kanth Shaha*(1) that if on an application to the executing Court the sale could be set aside the defendants are entitled if in possession to resist a suit for ejectment on the same grounds. This, it is urged, would save a multiplicity of proceedings. I can quite understand that in cases where the sale conveyed no title the defendant should not be compelled by reason of section 244, Civil Procedure Code, to take any step to set it aside. But if I am right in the view that the sale in this case passed an effective title subject to its being defeated at the discretion of the executing Court, the decision in *Bhiram Ali Shaik Shikdar* v. *Gopi Kanth Shaha*(1) cannot be said to be in point. And if my appreciation of the legal position of the parties in this suit be correct, the argument based on convenience has no force. Nor do I see how questions bearing upon the exercise of the discretion vested in the executing Court under section 294, Civil Procedure Code, can be properly determined as a matter of defence to a suit like this. The only course open to the defendants was when the facts of the purchase by the first plaintiff in the name of the second plaintiff came to their knowledge to apply to the Court which held the sale to set it aside under section 294, Civil Procedure Code.

In the view I take the appeal should be allowed and the judgments of the Subordinate Courts reversed, but as there are other issues raised which have not been tried the suit must be remanded to the Munsif for the trial of those issues. Costs will follow the result.

This second appeal coming on again for hearing before the Hon'ble Mr. Justice Sankaran-Nair under the provisions of section 575, Civil Procedure Code, His Lordship delivered the following.

JUDGMENT.—It is unnecessary for me to recapitulate the facts as they are fully stated in the judgments of my learned colleagues. Section 294 of the Civil Procedure Code is quite clear. It says distinctly that no decree-holder shall bid for or purchase the property "without the express permission of the Court." This provision precluded the first plaintiff from purchasing the property

(1) (1897) I.L.R., 24 Calc., 355.

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in the name of the second plaintiff. It is enacted in the interests of the judgment-debtor and other persons interested in the property. They need not therefore impeach the sale. But it is open to them to apply to the Court to set it aside and the Court may "if it thinks fit" set it aside.

As the defendants Nos. 4 and 5 were not aware before the confirmation of the sale that the second plaintiff was not the real purchaser and that it was the first plaintiff decree-holder who purchased the property in the name of the second plaintiff, the confirmation of the sale obviously cannot be a bar to enforcing their right to set aside the sale. My learned colleagues also take the same view. The only question then is whether the defendants may apply to set it aside in this suit in answer to the plaintiff's claim. On this point my learned colleagues differ. Mr. Justice Abdur Rahim taking the view that the executing Court alone can set aside the sale and that the proper course which should have been adopted by the respondents when the fact of the purchase by the first plaintiff came to their knowledge was to apply to the Court which held the sale to set it aside under section 294, while Mr. Justice Miller held, following the decisions referred to in his judgment, that it was open to the Court which tried this suit to set it aside.

It does not appear to have been brought to the notice of my learned colleagues, at any rate they have not noticed the fact, that the Court which executed the decree is also the Court which tried this suit.

It has been held and in my opinion rightly that in such cases section 244 is not a bar to the determination of the questions therein referred to by separate suit. The plaint in the suit is, or will be treated as, the application under section 244, Civil Procedure Code. Nor is there anything to prevent the Court, for the same reasons, from treating a written statement containing a prayer to set aside a sale as an application to set it aside under sections 244 and 294. If a defendant would, in a suit brought or application made by him, be entitled to a relief, which would be a complete answer to a plaintiff's claim, then as a defendant he is entitled to put forward his claim, unless he is estopped or otherwise barred by any rule of law. I can find no such bar in this case. I agree with the decision in Second Appeal No. 616 of 1903 which

follows the case of *Bhiram Ali Shaik Shikdar* v. *Gopi Kanth Shaha*(1).

The next question is whether the sale should now be upheld. Where a decree-holder purchases property in contravention of the provisions of section 294 and the judgment-debtor seeks to set aside the sale, I am of opinion that it is unnecessary for the latter to allege fraud or that the property has not been sold for its proper value; it is for the decree-holder to satisfy the Court that the sale should be confirmed. The decree-holder is in a more advantageous position than any other intending purchaser. However that may be, in this case, the burden of proving that the sale should be upheld is clearly on the plaintiff, as the purchase price was less than the amount lent on the land, less than the amount below which he was not so bid for the property under the order obtained by him and also as the purchase was make *benamee* for the purpose of concealing the matter from the Court or the defendants. Secrecy *primâ facie* implies fraud. I do not think it necessary therefore to call for any finding. I confirm the decree and dismiss the second appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Munro.

CHELLATHAMMAL (APPELLANTS), PETITIONERS,

v.

AMMAYAPPA MUDALIAR (PETITIONER), RESPONDENT.*

1908. December 2, 3.

Lunacy Act, XXXV of 1858, power of Court to control guardian appointed under Act.

A District Judge, who has appointed a guardian for a lunatic under Act XXXV of 1858, has jurisdiction to make an order requiring such guardian to obtain his permission before marrying the lunatic.

APPEAL against the order of C. G. Spencer, District Judge of Tinnevelly in Interlocutory Application No. 313 of 1907 in Original Petition No. 200 of 1904.

The respondent was appointed guardian of her lunatic son by the District Court under Act, XXXV of 1858. The petitioner

(1) (1897) I.L.R., 24 Calc., 355.

* Appeal against Order No. 64 of 1908.