Before Mr. Justice Mitter and Mr. Justice Norris.

1885 *August* 13.

NILMONY MOOKHOPADHYA (ONE OF THE DEFENDANTS) *v.* AIMUNISSA BIBEE AND OTHERS (PLAINTIFFS.)*

Evidence Act (I of 1872), s. 44—Fraud and Collusion—Decree obtained by Fraud and Collusion between mortgagor and mortgagee not binding on property in hands of purchaser though purchase be subsequent to decree.

A mortgaged certain property to *B*, who instituted a suit on his mortgage and obtained a decree therein. Subsequent to such decree *A* sold the property to a third party *C*. *B*, having attempted to execute his decree against the property in the hands of *C*, the latter instituted a suit against *A* and *B*, for the purpose of having it declared that the property was not liable to satisfy the decree because the mortgage transaction was a fraudulent one and the decree had been obtained by fraud and collusion. In such suit *B* contended that *C* having purchased subsequent to the decree was absolutely bound by it.

Held, that having regard to the terms of s. 44 of the Evidence Act, it was perfectly open to *C* to prove that the decree had been obtained by fraud and collusion.

Bhowabul Singh v. *Rajendra Protab Sahoy* (1) distinguished.

THE facts of this case were as follows. One Bhagiruth Barik died in the year 1280 (1873-74) leaving a widow, Golap Sundari, and two nephews, Motilal and Krishnadun (the second defendant in this suit). On the 28th Assin 1281 (13th October 1874) an agreement was come to between these parties, by which Golap Sundari made over her husband's estate to the nephews. Subsequently litigation ensued between them, and Golap Sundari, having obtained a decree, took out execution and attached certain properties, including the property now in suit, in the month of December 1876; that attachment was, however, subsequently withdrawn. On the 17th Falgun 1283 (27th February 1877), Krishnadun executed a mortgage in favor of Nilmony Mookerjee (defendant No. 1 in this suit), purporting to mortgage some eighteen properties, including that now in suit, for the sum

*Appeal from Appellate Decree No. 2,906 of 1883, against the decree of G. G. Day, Esq., Officiating Judge of Nuddea, dated the 17th September 1883, reversing the decree of Baboo Umakant Chatterjee, Second Munsiff of Krishnagore, dated the 17th of July 1882.

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of Rs. 484, which was alleged to be due to the said Nilmony Mookerjee, the mortgage bond carrying interest at thirty per cent. In Shrabun 1284 (July-August 1877) Krishnadun executed another mortgage for Rs. 1,900, in favor of one Modusudun Nath, which contained a recital that the properties mortgaged had not been previously encumbered in any way. The Rs. 1,900 so obtained were applied to paying off Golap Sundari's decree. About the same time, namely in Shrabun 1284 (July-August 1877), a partition was come to between Krishnadun and his brother Motilal, and the property in suit along with others fell to the share of Krishnadun.

Subsequently on the 2nd September 1878, Krishnadun, in order to pay off the mortgage money due to Modusudun Nath, sold certain of the properties so allotted to him, and amongst others sold the property now in suit to Ashruf Sheik, the predecessor of the plaintiffs' for the sum of Rs. 725.

Previous to the sale to Ashruf Sheik, Nilmony had obtained a decree on the 16th April 1878 against Krishnadun on his mortgage dated the 17th Falgun 1283 (27th February 1877) in a suit instituted in 1878, and in execution of that decree he attached the property purchased by Ashruf Sheik. The plaintiffs preferred a claim in these execution proceedings, but were unsuccessful, and they accordingly instituted this suit seeking for a declaration that they were entitled to possesion of the property in suit; that the mortgage in favor of Nilmony and the decree obtained thereon were fraudulent transactions; and that it might be declared that the property purchased by Ashruf Sheik was not liable to satisfy that decree, or at all events that they were entitled to have the amount of that decree *rateably* distributed over all the properties subject to the mortgage.

Nilmony alone contested the suit, and claimed that his mortgage took priority, and that he was entitled to execute his decree in the way he sought. He maintained that the transaction was not a fraudulent one.

The first Court held that, though there were a number of circumstances tending to throw suspicion on the mortgage bond of 17th Falgun 1283 (27th February 1877), the onus of proving fraud lay on the plaintiffs, and as they had failed to discharge

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that onus, they were not entitled to the decree they sought, and that they were certainly not entitled to have the amount due on the mortgage *rateably* distributed over all the properties comprised in it. Holding, therefore, that all they were entitled to was to redeem the mortgage, that Court dismissed the suit with costs.

The lower Appellate Court reversed that decision, holding that the plaintiffs had established the fraudulent character of the transaction, and that the decree obtained by Nilmony was obtained fraudulently and collusively. That Court upheld the decision of the lower Court upon the question of *rateable* distribution of the mortgage debt. But upon its finding on the first issue that question became immaterial.

Nilmony now specially appealed to the High Court against that decision, and the only ground upon which it was sought at the hearing of the appeal to reverse the decree of lower Court, was that as the plaintiffs' predecessor had bought the mortgaged property subsequent to the date of the mortgage decree, they were not entitled to question the validity or *bona fides* of that decree, but were absolutely bound by it.

Baboo *Rash Behary Ghose*, for the appellant

Baboo *Biprodas Mookerjee*, for the respondents.

The judgment of the High Court (MITTER and NORRIS, JJ.) was as follows:—

It appears that the appellant-defendant No. 1 on the 16th of April 1878 obtained a decree against the defendant No. 2, Krishna Mohun Barik declaring his mortgage lien over the property in dispute, as well as other properties not in suit based on a bond, dated 17th Falgun 1283, alleged to have been executed in his favor by the defendant No. 2. On the 18th Bhadro 1285, corresponding with the 2nd September 1878, the defendant No. 2 sold the property in dispute to one Ashruf Sheik, ancestor of the plaintiffs-respondents before us.

In execution of the decree obtained by the appellant against the defendant No. 2, the property in dispute was attached. The plaintiffs-respondents thereupon intervened and claimed the release of the attached property. Their claim was rejected.

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The present suit was brought to set aside the order rejecting their claim, and it is mainly based upon the ground that the bond dated 17th Falgun 1283, and the decree thereupon, dated 16th April 1878, were fraudulent transactions resorted to by the defendant No. 2, in collusion with the defendant No. 1, in order to defeat his creditors.

The Court of first instance dismissed the plaintiffs' suit, but on appeal the District Judge, reversing the decree of the Munsiff, has awarded a decree in favour of the plaintiffs, finding the facts stated above which form the basis of the suit as established upon the evidence.

The only question that has been argued before us in this second appeal is, that taken in the third ground of appeal, which is to the following effect: "For that the Court below ought to have held that the plaintiffs having bought the property subsequently to the mortgage-decree was not entitled to question the validity or *bona fides* of the said decree which was absolutely binding on the plaintiffs." In support of this contention the learned vakeel for the appellant relied upon the case of *Bhowabul Singh* v. *Rajendra Protab Sahoy* (1). We are of opinion that this contention is not sound. It is quite clear that, if defendant No. 2 could be permitted to establish by evidence that the bond and the decree in favour of the appellant were fraudulent, the plaintiffs-respondents are certainly entitled to do so.

Now s. 44 of the Evidence Act says: "Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under section 40, 41 or 42, and which has been proved by the adverse party was delivered by a Court not competent to deliver it or was obtained by fraud or collusion."

The contention of the appellants is, therefore, opposed to the express provision of s. 44 of the Evidence Act; neither does the case cited before us support it. The facts of that case are briefly these:—The plaintiff Rajendra Protab Sahoy was a defendant in a suit brought against himself and three other persons. It was alleged by him that the plaintiffs sold their rights to the property in dispute to him in the name of one Bhowabul Singh, who was substituted as plaintiff. Ultimately a

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decree was passed in favour of Bhowabul Singh against Rajendra Protab Sahoy and the other defendants in the suit. It was further alleged that, since his purchase of the property in dispute, he Rajendra Protab Sahoy remained in possession of it although the name of his benamidar, Bhowabul Singh, was used.

The immediate cause which led to the institution of the suit was, as alleged by the plaintiff, that Bhowabul Singh, in collusion with one Chutterbhooj, caused a decree to be passed against himself in favour of Chutterbhooj, and in execution of that decree, caused the property in dispute to be attached; that the plaintiff Rajendra Protab Sahoy intervened and claimed a release of it on the ground that it belonged to himself and not to Bhowabul Singh. His intervention being unsuccessful, he was compelled to bring that suit for a declaration of his right.

A Division Bench of this Court held that the decree which was obtained by Bhowabul Singh against the plaintiff Rajendro Protab Sahoy, was conclusive evidence of the title of the former against the latter, and any title, supposed to have been vested in the plaintiff prior to that decree, could not be set up in support of the plaintiff's claim. The decree in question was not impeached as invalid on the ground of collusion or fraud, but on the ground that it was a sham proceeding, in which the nominal plaintiff was really another name for the real defendant. The Court observed as follows: "The plaintiff, on the other hand, denies that except under ss. 259 and 260 of the Code of Civil Procedure there is any restriction whatever on the rights of parties in this country to show the real nature of a benami transaction, and he contends that the rule as to the conclusiveness of decrees must be subject to the right of any of the parties to show for whose benefit the suit was carried on."

"It is on this point that our judgment chiefly turns. I think that there is no such general exception as is contended for by the plaintiff to the rule that a decree of Court is final and conclusive between the parties. It seems to me that it would lead to endless confusion if the defendant on the record could show that, so far from being really a defendant, he was the plaintiff; that so far from judgment having been recovered against him, he had really recovered judgment. Not a single instance has been

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adduced before us of the benami system having been carried so far, and though it may be too late for this Court to abolish that pernicious system to the extent to which it is established, it is highly desirable not to introduce it where it is as yet unknown."

"It is hardly necessary to observe that the case before us stands quite apart from those cases where a third person who is not on the record at all, comes in to show that a suit was carried on really for his benefit. It also stands apart from those cases where a person on the record seeks to show that a suit was carried on really against a person who was not a party to the suit. This, though a highly inconvenient practice, has been very frequently allowed, and to such cases the present decision does not apply."

"Nor need we consider in this case the reasons why a person, against whom an adverse decree has been obtained, is allowed in some cases to show cause why the decree should not be executed. No such question arises here."

The last paragraph quoted above shows that the case cited does not decide, one way or the other, the question that is now before us.

We are of opinion that the ground taken before us is not valid. The appeal will be dismissed with costs.

Appeal dismissed.

Before Mr. Justice Mitter and Mr. Justice Macpherson.

HURRY CHARAN BOSE (DECREE-HOLDER) *v.* SUBAYDAR SHEIKH (JUDGMENT-DEBTOR.)*

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Execution of decree—Limitation—Application for execution of decree for arrears of rent—Proper application—Civil Procedure Code (Act XIV of 1882), ss. 235, 237, 245.

Within the period of three years from the date of a decree for arrears of rent under Rs. 500, the judgment-debtor applied for execution of his decree without giving a list of the properties which he sought to attach, but stating that a list was filed with a previous application, and praying that that application might be put up with the present one. Subsequently upon an order made by the Court a fresh list was filed after the period of a year had elapsed.

* Appeal from Appellate Order No. 58 of 1885, against the decree of T. M. Kirkwood, Esq., Judge of Zillah Moorshedabad, dated the 16th of December 1884, reversing the order of Baboo Triguna Prasanna Bose, Munsiff of Lalbagh, dated the 5th of September 1884.