

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

MATHURA DAS (DEFENDANT) v. LACHMAN RAM AND ANOTHER

(PLAINTIFFS).*

1902
February 2.

Civil Procedure Code, section 244—Execution of decree—Suit for cancellation on the ground of fraud of a sale held in execution of a decree—Proper remedy by application.

Certain judgment-debtors brought a suit against the decree-holders and the auction-purchaser for cancellation of a sale held in execution of a decree, upon the allegation that the sale in question had been brought about by fraud, the decree having in fact been previously satisfied. *Held*, that such a suit would not lie, the plaintiffs' remedy being by application under section 244 of the Code of Civil Procedure. *Prosunno Coomar Sanyal v. Kasi Das Sanyal* (1), *Dhani Ram v. Chaturbhuj* (2), *Daulat Singh v. Jugal Kishore* (3), *Bhubon Mohan Pal v. Nunda Lal Dey* (4) and *Moti Lal Chakraborty v. Russick Chandra Bairagi* (5) referred to.

IN the suit out of which this appeal arose the plaintiffs came into Court under the following circumstances. According to their allegations one Baijnath Prasad, in execution of a decree obtained against them by his father, Dilsukh Rai, had caused certain property of theirs to be advertised for sale. Upon this they sold the property to Sadho Ram and others, and with the proceeds thereof paid off the decree. The decree-holder, on the 28th of February, 1898, acknowledged this payment, and applied to the Court executing the decree that the execution case might be struck off, which was accordingly done. Subsequently the decree-holder again took out execution of the same decree, and caused the said property of the judgment-debtor to be put up for sale on the 20th of February, 1899, and it was sold and purchased by one Mathura Das. The plaintiffs thereupon filed the present suit against the decree-holder and the auction purchaser, in which they asked that sale of the 20th of February, 1899, might be set aside as having been obtained by fraud, and that they might be restored to possession of the property. The defendants objected that the suit did not lie, the remedy of the plaintiffs, if any, being by means of an application under section 244 of the Code of Civil Procedure. The Court of first instance (Officiating Subordinate Judge of Gorakhpur) entertained this

* First Appeal from Order No. 14 of 1901 from an order of F. W. Fox, Esq., District Judge of Gorakhpur, dated the 6th December 1900.

(1) (1892) L. R., 19 I. A., 166. (3) (1899) I. L. R., 22 All., 108
(2) (1899) I. L. R., 22 All., 86. (4) (1899) I. L. R., 26 Calc., 324.
(5) (1896) I. L. R., 26 Calc., 326.

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objection and dismissed the suit, refusing to accede to the plaintiffs' suggestion that the plaint should be treated as an application under section 244. On appeal the lower appellate court (District Judge of Gorakhpur) overruled the Subordinate Judge on both points, and remanded the case under section 562 of the Code. From this order of remand the defendant, Mathura Das, appealed to the High Court.

Munshi *Gobind Prasad*, for the appellant.

Mr. *S. S. Singh*, for the respondents.

STANLEY, C.J. and BURKITT, J.—This is an appeal from an order of the District Judge of Gorakhpur, remanding a case under section 562 of the Code of Civil Procedure to the Officiating Subordinate Judge of Gorakhpur for determination upon the merits. The suit was brought for cancellation of a sale deed executed in favour of the appellant Mathura Das, upon a sale had in execution of a decree obtained by two persons, Baij Nath and Dilsukh, against the present appellant. The allegation of the plaintiffs in the suit is, that the sale was fraudulent, the same having been brought about collusively between the parties after the decree had been satisfied. The learned Officiating Subordinate Judge, in a carefully-considered judgment, held that the suit was not maintainable, having regard to the provisions of section 244 of the Code of Civil Procedure, and he accordingly dismissed the suit. He also on an application made to him to treat the suit as equivalent to an application under section 244, refused to do so upon the grounds stated at length in his judgment. There was an appeal from this decree to the District Judge of Gorakhpur, when the learned Judge, after reviewing the authorities, was pleased to overrule the decision of the Officiating Subordinate Judge, and to remand the case under the section to which we have referred. The District Judge appears to have overlooked the later decisions both of the Allahabad High Court, and also of the Calcutta High Court, following upon the judgment of their Lordships of the Privy Council in the case of *Prosunno Coomar Sanyal v. Kasi Das Sanyal* (1). In this case their Lordships clearly stated the grounds upon which the Court should act in carrying out the

provisions of section 244, and expressed disapproval of some of the earlier decisions. The recent cases in this High Court are the case of *Dhani Ram v. Chaturbhuj* (1) and the case of *Daulat Singh v. Jugal Kishore* (2), and there are the more recent cases in the Calcutta High Court of *Bhubon Mohun Pal v. Nunda Lal Dey* (3) and *Moti Lal Chakrbutty v. Russick Chandra Biragi* (4). In these cases effect is given to the principle laid down by their Lordships of the Privy Council, and in the two last mentioned cases it was held that the fact that the purchaser who was no party to the suit was interested in the result of the application, was no bar to the application of section 244, and that an application to set aside a sale on the ground of fraud would come under section 244 of the Code of Civil Procedure, notwithstanding that the purchase was made by a person who was a third party. These authorities abundantly show that the Officiating Subordinate Judge was entirely correct in the view which he took, and that the learned District Judge was in error in reversing his decree. We might also observe that in dealing with the authorities of this Court which were cited before him, the District Judge has entirely misconceived and misinterpreted them.

Upon the other question as to whether the suit might have been regarded as an application under section 244, this was entirely a matter in the discretion of the Officiating Subordinate Judge, who gave it his consideration, and came to the conclusion, in the exercise of his discretion, that the suit ought not to be treated as such an application. We see no reason for interfering with the determination at which he arrived. Accordingly we allow this appeal, set aside the decree of the District Judge, and dismiss the appeal by the plaintiff to him and we restore the decree of the Officiating Subordinate Judge directing that the suit do stand dismissed with costs.

Appeal decreed.

(1) (1899) I. L. R., 22 All., 86.
 (2) (1899) I. L. R., 22 All., 108.

(3) (1899) I. L. R., 26 Calc., 324.
 (4) (1899) I. L. R., 26 Calc., 326.

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