

It was argued that the judgment appealed from is inconsistent, inasmuch as it condemns the plaintiff, Nam Narain Singh, in costs, while holding that, the suit was rightly dismissed on the ground of want of proof of Sheo Narain Sett's authority to bring it. This objection, if valid, applied to the judgment of the lower Court, but it was not taken as one of the grounds of appeal from the lower Court, and it does not appear that the attention of the High Court was called to this point. But the appeal being brought by Nam Narain Singh, he was properly condemned in costs for appealing against a judgment which, upon the materials before the Court, was rightly pronounced. His proper course would have been to prove that he had, in fact, given authority to Sheo Narain Sett to bring the suit in his name, but he made no application to be allowed to supply this proof, but simply appealed. By so doing he subjected himself to the jurisdiction of the Court to condemn him in costs.

Their Lordships will humbly advise Her Majesty to dismiss the present appeal.

Appeal dismissed.

Solicitors for the appellant: *Messrs. A. H. Arnould & Son.*

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PROSUNNO KUMAR SANYAL AND ANOTHER (PLAINTIFFS) v. KALI DAS SANYAL AND OTHERS (DEFENDANTS).

P. C.*
1892
May 14.

[On appeal from the High Court at Calcutta.]

Execution of Decree—Suit to have an execution sale of land set aside—Civil Procedure Code (Act XIV of 1882), s. 244—Parties to the suit—Fraud, allegation of.

Where questions are raised between the parties to a decree relating to its execution, discharge, or satisfaction, the fact that the purchaser at a judicial sale, who is no party to the decree of which the execution is in question, is interested and concerned in the result has never been held to prevent the application of section 244 of the Civil Procedure Code, limiting the disposal of these matters to the Court executing the decree.

The plaintiffs in a suit to have the judicial sale of a zemindari set aside alleged that the decree-holder, in part satisfaction of his decree, had received,

Present: LORDS HOBHOUSE, MACNAGHTEN, HANNEN and SIR R. COUCH.

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from them and other co-sharers in the zemindari, their proportionate amounts of the debt decreed, and had agreed that their shares should be exempt from the execution sale about to take place: that the sale took place, subject to that exemption: that the decree-holder, however, with whom some of the co-sharers and the purchasers colluded, fraudulently had the sale set aside, revived the attachment, and caused a second sale, at which all the shares in the zemindari were sold.

Held, that the question, besides that the charge of fraud was not sufficiently specific, was determinable, in virtue of the section 244 of the Code of Civil Procedure, only by order of the Court executing the decree.

APPEAL from a decree (9th August 1888) of the High Court, affirming a decree (10th August 1886) of the Subordinate Judge of Pubna.

This suit, dismissed in both the Courts below, was brought on the 6th March 1886 to have set aside, as fraudulently brought about, a judicial sale, which, under a decree of 1880, took place in the Munsifi of Serajganj on the 10th July 1883, and was confirmed on the 30th June 1884. A petition of the 4th August 1883 against this sale was rejected on that date, the purchasers at the auction, Ishwar Chunder Roy and Akhoyakant Sanyal, having been served with notice of the petition. An appeal from this order of rejection was preferred to, and on the 10th September 1883 rejected by, the District Judge of Pubna.

The two present appellants, Prosunno Kumar Sanyal and Drobomoyi Debi, were plaintiffs with two others in this suit. The respondents, of whom the eighth, Protab Chunder Banerji, was the decree-holder and attaching creditor, were eight out of the twenty defendants, the remaining twelve having been only formal parties. The purchasers were among the eight.

The ground of dismissal was that this suit was barred; *Firstly*, by limitation, under the 12th article of schedule II of Act XV of 1877, as being a suit to set aside a sale in execution of a decree, and not brought within one year from the confirmation of that sale; *secondly*, by the 244th section of the Code of Civil Procedure, sub-section (c) as involving questions between the parties to the suit in which the decree was passed, and relating to its execution, discharge, or satisfaction, and therefore determinable only, as it had been determined, by the order of the Court executing the decree.

The appellants, with the two other plaintiffs who did not join in this appeal, and also five of the respondents, were co-sharers together with the formal defendants, as proprietors holding, in distinct shares, a zemindari in the Pubna district called Futtehpore, paying a revenue of Rs. 2,720. The share of Prosunno Kumar was $1\frac{1}{2}$ annas; that of the second appellant, Drobomoye Debi, was $17\frac{1}{2}$ gandas; and that of the second plaintiff, Dibendranath Sanyal, who did not join in this appeal, was 3 annas.

Against all the co-sharers in Futtehpore a decree for land had been obtained by the eighth respondent, Protab Chunder Banerji, who obtained a decree, dated the 2nd October 1880, for Rs. 660, *meane profits and costs*. In execution of that decree he attached the whole zemindari of Futtehpore, and took the proceedings which were the subject of the present suit. The first, second, and third plaintiffs, paid, as they alleged, their quota, *pro rata*, of the money decreed; and, according to them, the decree-holder undertook not to proceed against their shares of the property, Futtehpore, which was sold on the 10th February 1882, as against, and so as to include, the shares only of the other judgment-debtors who had not paid. More than sufficient to pay the sum due was realized, viz., Rs. 2,030, the defendants 1 to 5 purchasing in the names of their servants, defendants 6 and 7, Akhoyakant Sanyal and Ishwar Chundra Roy. Subsequently, all the parties concerned in that sale, viz., the decree-holder, the co-sharer debtors, and the auction-purchasers agreed to have that sale set aside. It was set aside on the 1st September 1882, and the attachment on Futtehpore was revived. New proceedings in execution of Protab Chunder's decree of 1880 were then taken, and the whole zemindari, including the shares of the plaintiffs, was put up to sale and sold. It was purchased by the defendants 6 and 7, whom the plaintiffs now alleged to be mere benamidars for the debtors, their co-sharers, defendants 1 to 5. The case for the plaintiffs, in short, was that Protab Chunder, the co-sharer debtors, and the ostensible auction-purchasers colluded together and caused the whole zemindari to be sold in breach of the agreement. They, therefore, claimed to have the second sale set aside as illegal, and that they might be declared entitled to their respective shares in Futtehpore, and that the defendants might be restrained by injunction from taking possession.

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The issues raised questions of (i) limitation; (ii) the agreement as to exemption of the plaintiffs' shares and subsequent fraud; and (iii) the application of section 244 of the Code of Civil Procedure.

The Subordinate Judge dismissed the suit on the ground above stated, holding that the year prescribed began to run from the date of the confirmation of the sale by the first Court and not from the date of the dismissal of the appeal from that order of confirmation. He did not take any evidence on, or decide, the issues as to fraud and collusion. But he held the plaintiffs precluded by sections 13 and 244 of the Code of Civil Procedure from raising the question in this suit as to the defendants having acted fraudulently in bringing about the second sale in execution.

The High Court (TOTTENHAM and CHUNDER MADHUB GHOSE, JJ.) were also of opinion that the year ran from the confirmation by the first Court, citing *Mahomed Hossein v. Purundur Mahto* (1). On the other point they said:—"The fraud alleged is alleged really against the decree-holder as having, in breach of the agreement made by him after receiving the plaintiffs' quota of the debt decreed, brought their share of the property to sale. That matter was adjudicated upon in the execution department and was decided against the plaintiffs. It was clearly a matter arising under section 244 of the Code, and therefore no separate suit on that part of the case can lie." They concluded thus:—

"Then as regards the other defendants, namely, the plaintiffs' co-sharers, and the purchasers at auction, there is really no case made out at all: there is no case even alleged in the plaint. There was nothing more than a general allegation of fraud and collusion between them and the decree-holder. But it is not enough to make a general allegation of that sort: the allegation must be specific and must be proved. In the present case it is impossible that the plaintiffs could prove the allegation, because it was not a definite allegation. But, apart from that, the allegation in the plaint does not disclose any such fraud as to raise a case that could be tried. Authority for this is to be found in a recent decision of the Privy Council, in *Gunga Narain Gupta v. Tiluckram Chowdhry* (2). Their Lordships, referring to a case in the Appellate Court,

(1) I. L. R., 11 Cal., 287.

(2) I. L. R., 15 Cal., 523.

quoted the following from Lord Selborne's judgment: 'With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice.'

"In this case there is nothing more than a strong averment of collusive conduct against all the defendants. It seems to us therefore that, while against the decree-holder there is one specific allegation of fraud that was disposed of in the previous proceedings, as regards the other defendants there is no such specific allegation of fraud as the Court may enquire into. So that, on both grounds, the suit must fail. We accordingly dismiss the appeal with costs."

Mr. *R. V. Doyle* appeared for the appellants.

The respondents did not appear.

The principal argument for the appellant was that the purchasers, against whom collusion was now alleged, were not parties to the decree of the 2nd October 1880, and, therefore, not among "the parties" to whom section 244 of the Code of Civil Procedure referred. This section was, therefore, no bar to this suit. Again, the claim having been founded on fraud alleged to have been effected by the defendants, the three years' period of limitation under the 95th article of Schedule II should have been allowed. The establishing fraud was mixed up with the question of the period to be allowed from its discovery to the date of the suit. The plaintiffs' allegations were sufficiently explicit to entitle them to have the issues relating to the merits tried in this suit, the three years' period being allowed.

Their Lordships' judgment was delivered by—

LORD MACNAGHTEN.—The suit in this case was brought for the purpose of setting aside the sale of a zemindari in the district of Pubna called Futtehpore, which was sold in execution of a civil decree on the 10th of July 1883. The Subordinate Judge dismissed the suit on preliminary grounds, without going into the merits. The High Court at Calcutta affirmed his decree.

It appears that some time before 1880 the respondent, Protab Chunder Banerji, recovered against the appellants, and certain persons who were co-sharers with them in Futtehpore, a decree for

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possession of some lands in dispute, and also a money decree for mesne profits and costs. In execution of that decree Futtehpore was attached. Thereupon, as the appellants allege, they and two other persons, who were co-plaintiffs in the suit before the Subordinate Judge, paid their quota of the judgment-debt, and came to an arrangement with the judgment-creditor that their shares should be exempted from sale. The shares of the other co-sharers were alone put up for sale, and they were sold on the 10th of February 1882. Afterwards this sale was set aside, the attachment was revived, a fresh sale took place, and on the 10th of July 1883 the whole of Futtehpore was sold. The allegation in the plaint is that the setting aside of the first sale, the revival of the attachment, and the second sale, in which the shares of the plaintiffs were sold with the rest, were brought about by fraud and collusion on the part of the other co-sharers, the judgment-creditor, and the auction-purchasers, who were all made defendants. No particulars of the alleged fraud and collusion are given. The charge is general and perfectly vague. If it means anything, it can only mean that the judgment-creditor broke his alleged agreement with the plaintiffs, and that the other persons alleged to have been implicated, being aware of the circumstances, took some part in the transaction.

Both Courts have held that the question which the plaint seeks to raise could only have been determined by the order of the Court which executed the decree, and that in such a case as the present a separate suit for the purpose of setting aside an execution sale is expressly forbidden by section 244 of the Civil Procedure Code.

Mr. *Doyle*, who appeared for the appellants, admitted that the question at issue was one "relating to the execution, discharge, or satisfaction of the decree." But he argued with much ingenuity that the suit was not barred by the provisions of section 244, because the question concerned the auction-purchasers as much as anybody, and therefore, as he contended, it could not properly be described as a question "arising between the parties to the suit in which the decree was passed." At the same time he admitted that he was unable to produce any authority for his contention, and he also admitted that it was the common practice to make the auction-purchaser a party to an application for setting aside an execution sale.

As the point appeared to be one of some importance, and the respondents were not represented at the Bar, their Lordships thought it desirable, before giving judgment, to examine the reported cases which have arisen under section 244 of the Civil Procedure Code. An examination of those cases, of which it is only necessary to mention *Sakharam Govind Kale v. Damodar Akharam Gujar* (1) and *Kuriyali v. Mayan* (2) has satisfied their Lordships that the decision appealed from is in accordance with the construction which the Courts in India have uniformly placed on the section in question.

It is of the utmost importance that all objections to execution sales should be disposed of as cheaply and as speedily as possible. Their Lordships are glad to find that the Courts in India have not placed any narrow construction on the language of section 244, and that, when a question has arisen as to the execution, discharge, or satisfaction of a decree between the parties to the suit in which the decree was passed, the fact that the purchaser, who is no party to the suit, is interested in the result has never been held a bar to the application of the section.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellants : Messrs. *Wrentmore and Swinhoe.*

C. B.

ZAKERI BEGUM (PLAINTIFF) *v.* SAKINA BEGUM AND OTHERS
(DEFENDANTS).

[On appeal from the High Court at Calcutta.]

P. C.*
1892
March 29.
May 28.

Mahomedan Law—Dower—Oudh, Law of, relating to reduction in amount of dower—Determination of amount of deferred dower recoverable from representatives of deceased husband married in but a non-resident of Oudh, not affected by law of that Province—Evidence Act (I of 1872), s. 32, cl. (2)—Entry in Mahomedan Marriage register of amount of dower, admissible in evidence to prove amount fixed.

A Mahomedan, a resident in Patna, since deceased, married the plaintiff, while he was for a time in Lucknow where she lived. Upon her claim, as

* *Present* : LORD MACNAGHTEN, LORD HANNEN, SIR RICHARD COUGH, and LORD SHAND.

(1) I. L. R., 9 Bom., 468.

(2) I. L. R., 7 Mad., 255.