

Before Mr. Justice Tottenham and Mr. Justice Banerjee.

JAGAN NATH GORAI AND OTHERS (PLAINTIFFS) v. WATSON AND
COMPANY (DEFENDANTS).*

1892
January 22.

Sale in execution of decree—Fraud—Suit to set aside sale on ground of fraud—Civil Procedure Code (Act XIV of 1882), ss. 244 and 311.

A and *B* were two tenants whose names were registered in the landlord's *sherista*. *B* died, leaving *C*, *D* and *E*, his sons and heirs, but no application for mutation of names in the *sherista* was made. Disputes as to rent having arisen, *A* and *C* proceeded to make deposits in Court in respect thereof, and the landlord instituted a suit against *A*, joining *C* as a party defendant to recover the amount of rent he claimed, and obtained an *ex-parte* decree which, *inter alia*, directed that it should be satisfied out of the amount so deposited in Court. That amount, according to the landlord's case, proving insufficient to satisfy his demands, he proceeded to execute the decree and brought the holding to sale and purchased it himself. *A* and *C* then applied under section 311 of the Code to have the sale set aside, alleging that the decree had been fraudulently executed, the sale proclamation suppressed, and that the decree was incapable of execution in the manner adopted, and contending that it could only be executed against the amounts so deposited in Court, which were more than ample to satisfy the full amount justly due under it. That application was unsuccessful.

A, *C*, *D* and *E* then instituted a suit to have the sale set aside on the ground of fraud.

Held, as regards *A* and *C*, following the decision in *Mohendro Narain Chaturaj v. Gopal Mondul* (1), that the questions as to the propriety of the execution of the rent decree by sale, and as to the suppression of the sale proclamation, were questions which could and ought to have been decided under section 244, and that, so far as they were concerned, the suit would not lie.

Held, however, as regards *D* and *E*, that as they were not parties to the rent suit or proceedings had therein, and although as heirs of a deceased tenant who had not got their names registered in the landlord's *sherista*, they might not be able to question the decree obtained for arrears of rent, they were not thereby precluded from contesting a sale on the ground that

* Appeal from Appellate Decree, No. 1434 of 1890, against the decree of J. Pratt, Esq., District Judge of Midnapore, dated the 15th of August 1890, reversing the decree of Babu Jogendro Nath Mookhopadhya, Munsif of Garbetta, dated the 27th of November 1889.

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it had been fraudulently obtained under colour of such a decree, and that it was competent to them at any rate to sue for a declaration that the sale in question did not in any way affect their rights.

IN this case Jagan Nath Gorai and his brother Radha Nath Gorai were the recorded tenants of certain holdings in the *sherista* of the defendants, Messrs. Robert Watson & Co. Radha Nath Gorai died, leaving his three sons, the plaintiffs Nos. 2, 3, and 4, his heirs, but on his death no application was made to the defendants for mutation of names in respect of the holding.

Disputes having arisen with reference to the rents of the holdings, Messrs. Watson & Co. instituted three suits against Jagan Nath Gorai in respect thereof, and joined Sibū Nath, the plaintiff No. 2 in this case, who was the eldest son of Radha Nath, as a party defendant therein. In these suits Messrs. Watson & Co. obtained *ex-parte* decrees, and in execution of those decrees brought the holdings to sale and purchased them themselves. After the sales the two judgment-debtors applied, under section 311 of the Code of Civil Procedure, to have them set aside. They alleged, amongst other things, that on the disputes arising they had deposited the full amount of rent in Court, that the decrees obtained provided that the amount decreed be satisfied from the amount so deposited by them, and that, notwithstanding that provision in the decrees, the judgment-creditor had fraudulently brought the holdings to sale and purchased them at ridiculously low figures. It appeared that the decrees had been executed for a balance claimed over and above the amount deposited, but the judgment-debtors' contention was that the amount deposited was more than ample to meet the full amount of rent and costs. They further alleged that the sale proclamations had been suppressed. These applications having failed, the two judgment-debtors, together with the other two sons of Radha Nath who were not parties to these suits and proceedings, instituted three suits to have the sales set aside as fraudulent and illegal, and to be confirmed in possession of the holdings of which they were still in possession; and in the alternative they prayed for damages if the sales could not be set aside.

The principal contention on the part of the defendants was that, having regard to the provisions of section 244, the suits would not

lie, and that the question of whether the sales had been fraudulently obtained or not was *res judicata* under section 13.

All three suits were tried together and were governed by the same judgment in both the lower Courts.

The first Court gave the plaintiffs decrees setting aside the sales and confirming them in possession.

The lower Appellate Court reversed those decrees, holding that the cases were governed by the Full Bench ruling in *Mohendro Narain Chaturaj v. Gopal Mondul* (1). As regards the contention that plaintiffs Nos. 3 and 4, being no parties to the rent suits, were not bound by the proceedings therein, that Court held that the landlords were not bound to make them parties, as their names were not registered in the *sherista* and they had not been recognized as tenants. The suits were accordingly dismissed.

The plaintiffs now appealed to the High Court in all three cases.

Mr. *R. E. Twidale* for the appellants.

Babu *Jogesh Chundra Roy* (for Babu *Bhobani Churn Dutt*) for the respondents.

The judgment of the Court (TOTTENHAM and BANERJEE, JJ.) was as follows:—

This and two similar appeals between the same parties have been heard together; the suits having been governed by one judgment in the lower Appellate Court. That Court dismissed the suits as being barred by section 244 of the Code of Civil Procedure under a ruling by a Full Bench of this Court in the case of *Mohendro Narain Chaturaj v. Gopal Mondul* (1). This second appeal is based on the contention that the Full Bench ruling is not applicable to this case, because the ground on which this suit was brought is not within the scope of sections 244 and 312 of the Code. By section 312 the appellants probably meant 311.

And as regards two of the plaintiff-appellants it is contended that they were not parties to the previous suit and decree, and cannot be barred from this suit by the section quoted by the lower Appellate Court.

The suit was brought to set aside a sale held in execution of a decree for arrears of rent against two of the plaintiffs. The other

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1892 two plaintiffs are brothers of plaintiff No. 2, but were not made parties to the suit for rent.

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After the sale had taken place the two judgment-debtors made an application under section 311 to have it set aside, but failed to obtain an order, and this suit was consequently instituted by all the plaintiffs as being all interested in the land sold. The decree-holders in the rent suit were themselves the purchasers at the sale in execution; and we think therefore that as between them and the plaintiffs 1 and 2 the questions now raised as to the propriety of the execution of the decree by sale of the property and as to the suppression of the sale proclamation were questions which could, and ought to have been decided under section 244. The principal contention now made on behalf of the plaintiff-appellants is that the decree did not warrant any sale at all, as it provided for its satisfaction out of money already deposited in Court by the judgment-debtors. It is clear that this is a matter which comes within the purview of section 244, and that that section prohibits a separate suit by parties to that decree. At one time it was not clearly understood that after a decree had been fully executed the Court could re-open the matter under section 244 and set aside a sale already confirmed, in which the decree-holder was purchaser; but the Full Bench case of *Mohendro Narain Chaturaj v. Gopal Mondul* (1) seems to us to lay down that there is no other remedy open by separate suit to the judgment-debtor, even though by fraud he may have been kept from knowledge of the execution proceedings until after the confirmation of a sale improperly obtained. We think that the lower Appellate Court took a correct view of the Full Bench ruling, and that, following it, as he was bound to do, the District Judge was right in holding that as regards plaintiffs 1 and 2 this suit was barred by section 244.

But in our opinion the District Judge was wrong in holding that the plaintiffs 3 and 4 were not competent to sue, at least to have it declared that the sale in question did not affect their rights.

It is true that as heirs of a deceased registered tenant, who had not got themselves registered in the landlord's *sherista*, they may not be able to question the decree obtained for

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arrears of rent, yet that fact does not preclude them from contesting a sale fraudulently obtained under colour of that decree, if it be true that the decree did not warrant any sale at all in execution of it.

We think, then, that the appeal of plaintiffs 1 and 2 must fail, and that plaintiffs 3 and 4 are entitled to succeed in this appeal.

We were asked to treat the suit as an application under section 244 so far as regards plaintiffs 1 and 2; but we cannot make it an application under that section as to two of the plaintiffs and a regular suit as to the other two.

The result is that, so far as the appellants 1 and 2 are concerned, the appeal is dismissed with costs; and that we make a decree in favour of the appellants 3 and 4, setting aside the decree of the lower Appellate Court as against them, and sending the case back to that Court that it may decide the case upon the merits as regards these plaintiffs. Costs will abide the result.

This order will apply also to appeals 1435 and 1436.

*Appeal allowed in part
and case remanded.*

H. T. H.

CRIMINAL MOTION.

Before Mr. Justice Norris and Mr. Justice Beverley.

SHASHI KUMAR DEY OF PAIKPARAH (PETITIONER) v. SHASHI
KUMAR DEY OF KHILPARAH (OPPOSITE PARTY).*

1892
January 27.

Sanction to prosecute—Case settled without evidence—Jurisdiction to give sanction—Enquiry by Court prior to granting sanction—Criminal Procedure Code (Act X of 1882), ss. 195, 476.

It is competent for a Civil Court before which a case may have been settled without any evidence being gone into, and which has grounds for supposing the offence of the nature referred to in section 195 of the Code of Criminal Procedure has been committed before it during the pendency of such case, to make a preliminary enquiry, and thus satisfy itself whether

* Criminal motion No. 552 of 1891, against the order passed by R. F. Rampini, Esq., Sessions Judge of Alipore, dated the 19th of September 1891, affirming the order passed by H. Ryper, Esq., Registrar, Court of Small Causes, Sealdah, dated the 6th of August 1891.