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it unnecessary to consider the other point raised by the learned Counsel for the appellant which proceeds on the assumption that the charges related to more than three particular offences. The appeal is therefore dismissed.

Appeal dismissed.

H. T. H.

CIVIL RULE.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Beverley, and Mr. Justice Ghose.

1892 *August* 9.

ABDUL GANI (OBJECTOR, PETITIONER) *v.* A. M. DUNNE, RECEIVER OF THE ESTATE OF SATYA GHOSAL BAHADUR (DECREE-HOLDER) AND OTHERS (AUCTION-PURCHASERS) AND ANOTHER (JUDGMENT-DEBTOR) (OPPOSITE PARTIES).*

Civil Procedure Code (Act XIV of 1882), *s.* 311—*Objection to sale by person claiming to be the real owner—Decree—Benamidar, decree against—Sale in execution of decree, application to set aside.*

Per PETHERAM, C.J. and GHOSE, J. (BEVERLEY, J. dissenting). Where immoveable property has been sold in execution of a decree against the ostensible owner as his property, a person claiming to be the beneficial owner is entitled to come in under s. 311 of the Code of Civil Procedure and object to the sale.

Asmutunnissa Begum v. *Ashruff Ali* (1) followed.

SHEIKH ABDUL GANI, the objector, in his petition to the High Court, stated that he and his brother, Abdul Aziz Meah, purchased *taluk* Jimina in execution of a decree for arrears of rent in the *benami* name of Kali Prosunno Ghose, a servant of theirs, and continued in possession of the *taluk* on payment of rent to A. M. Dunne, Esq., Receiver of the estate of Satya Ghosal Bahadur and others; that the said Receiver obtained a decree for arrears of rent against the said Kali Prosunno, and in

* Civil Rule No. 458 of 1892, against the order of A. E. Staley, Esq., District Judge of Backergunge, dated the 5th of February 1892, affirming the order of Baboo Saroda Prosad Bose, Munsif of Perozpore, dated the 7th of December 1891.

(1) I. L. R., 15 Calc., 488.

execution of the decree the *taluk* was put up for sale and purchased by the petitioner's brother Abdul Aziz in the *benami* name of Abdul Karim; that the petitioner applied to the Munsif to set aside the sale under section 311 of the Code of Civil Procedure and section 173 of the Bengal Tenancy Act, offering to pay the decretal money; that the Munsif without entering into the merits of the case declined to exercise his jurisdiction on the ground that the petitioner had no *locus standi* to make the application, and that section 173 of the Tenancy Act did not apply to the case; and that this decision had been upheld on appeal to the District Judge. The petitioner prayed to have the sale set aside.

The grounds upon which the objector relied were, (1) that the sale of the property was fraudulent, (2) that there was irregularity in conducting the sale and in publishing the sale proclamation, (3) that Kali Prosunno was the *benamidar* of the objector and his brother, Sheikh Abdul Aziz, and (4) that Abdul Aziz in order to defraud the objector had in collusion with the decree-holder caused the property to be sold and himself purchased it in the name of Abdul Karim Moah, who was ostensibly the auction purchaser.

The Courts below were of opinion that the petitioner had no *locus standi*, the matter being concluded by the decision of the Full Bench in *Asmutunnissa Begum* v. *Ashruff Ali* (1).

A rule having been obtained on the part of the objector, the Court, GHOSE and BEVERLEY, JJ., were divided in opinion and the matter was therefore re-argued before PETHERAM, C.J.

Mr. *Sandel* for Dr. *Rashbehari Ghose*, appeared in support of the rule.

Baboo *Durga Mohun Das* appeared to show cause.

The following opinions were delivered by the Court (PETHERAM, C.J., and GHOSE and BEVERLEY, JJ.)

BEVERLEY, J.—This rule was granted under the following circumstances:—

The appellant before us alleges that he and his brother Abdul Aziz Moah held a *taluk* in the name of their servant Kali

(1) I. L. R., 15 Calc., 488.

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Prosunno Ghose; that in execution of a decree for arrears of rent against Kali Prosonno Ghose, the *taluk* in question was put up to sale and was purchased by the appellant's brother in the name of one Abdul Karim. The appellant then applied to have the sale set aside under section 311 of the Code of Civil Procedure, but both the Lower Courts have held that he has no *locus standi* under that section. The question before us is whether a person claiming to be the beneficial owner of property which has been sold as the property of the ostensible owner, can apply to have the sale set aside under section 311 of the Code of Civil Procedure.

I am of opinion that the matter is concluded by the Full Bench decision in the case *Asmutunnissa Begum* v. *Ashruff Ali* (1). If, as is contended by the appellant, the property sold was the property of the appellant and not that of Kali Prosunno Ghose, the appellant's interest has not been affected by the sale and he is not entitled to come in under section 311. I am unable to distinguish the present case from that of the Full Bench case, and I am of opinion that the orders of the Lower Courts were right and that the rule should be discharged with costs.

GHOSE, J.—It appears that a certain tenure stood in the name of one Kali Prosunno. In execution of a decree for rent of that tenure obtained by the zemindar against Kali Prosunno, the tenure was sold under the Bengal Tenancy Act, and purchased by one Abdul Karim. The petitioner before us, Abdul Gani, subsequently applied, under section 311 of the Civil Procedure Code, to set aside the sale upon the ground of irregularity in publishing and conducting the sale, his case being that he and his brother were the beneficial owners of the property, Kali Prosunno being only a *benamidar*. This application has been rejected by the Courts below upon the ground that the petitioner has no *locus standi* under section 311. And the question that we have to determine is whether this view is correct.

My learned colleague is of opinion that the matter is concluded by the Full Bench decision in the case of *Asmutunnissa Begum* v. *Ashruff Ali* (1), and that the order of the Lower Courts is right.

(1) I. L. R., 15 Calc., 488.

I regret, however, I am unable to agree with him u view.

It may be useful in the first place to refer to what the law on the subject was before the present Procedure Code was passed. The corresponding section in the old Code (VIII of 1859) was section 256, and it provided that (omitting the first portion of the section) "at any time within thirty days from the date of the sale, application may be made to the Court to set aside the sale on the ground of any material irregularity in publishing or conducting the sale; but no sale shall be set aside on the ground of such irregularity unless the applicant shall prove to the satisfaction of the Court that he has sustained substantial injury by reason of such irregularity." There was a conflict of rulings under this section; the Calcutta High Court and the Agra Court held that it was only the judgment-debtor who could apply to set aside the sale; the Bombay High Court, on the contrary, were of opinion that the word "applicant" in section 256 is not confined to the parties to the suit, but also includes any person who has sustained injury by reason of the irregularity of the sale: [*Joge Narain Singh* v. *Bhugbano* (1); *Luchmeeput Singh Doogur* v. *Mooktakashee Debia* (2); *Maina Koer* v. *Luchmun Bhuggut* (3); *Krishnarav Venkatesh* v. *Vasudev Anant* (4); *Rae Sittaram* v. *Balkrishna Tewaree* (5)].

It was, I think, in view of this conflict of authorities that the Legislature provided in section 311, Act X of 1877, that "the decree-holder or any person whose immoveable property has been sold under this Chapter may apply to the Court to set aside the sale," &c., &c. And the language of section 311 in the present Code is exactly the same as in the Code of 1877.

We have it then that not the judgment-debtor only (as it had been held by this Court under the old Code), but "the decree-holder or any person whose immoveable property has been sold" may apply to set aside the sale; and the question we have to consider is whether the petitioner is a "person whose immoveable property has been sold."

(1) 2 W. R. Mis., 13.
(2) 9 W. R., 388.
(3) 1 C. L. R., 250.
(4) 11 Bom. H. C., 15.
(5) 1 S. D. A. (N.-W. P.), 377.

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Now if the allegation of the petitioner be true, he is certainly a person whose property has been sold: he says the property, though it stood in the name of Kali Prosunno, was really his, and that he has sustained substantial injury by reason of the sale.

It has been said that if the property belonged to the petitioner and not to Kali Prosunno, his interest has not been affected by the sale, and therefore he is not entitled to apply under section 311 of the Code. But it will be observed that the rent decree was passed against the person who was the recorded tenure-holder; and in execution of this decree the whole tenure, and not simply the right, title and interest of Kali Prosunno, would pass to the purchaser under the sale, if it is confirmed. The test that may well be applied in a case like this is to see whether the petitioner would be entitled to bring a suit to contest the sale or to recover the property.

Now, it has been held both in this Court and in Allahabad that the beneficial owner is bound by any decree that may be passed against the *benamidar*: *Gopi Nath Chobey* v. *Bhugwat Pershad* (1), *Khub Chand* v. *Narain Singh* (2). In the case of *Gopi Nath Chobey* v. *Bhugwat Pershad* (3), Mitter J., in delivering judgment of the Court upon a question like this, observed: "But apart from authorities, it appears to us that so long as the *benami* system is to be recognised in this country, the proper rule, in our opinion, is that in the absence of any evidence to the contrary it is to be presumed that the *benamidar* has instituted the suit with the full authority of the beneficial owner; and if he does so, any decision come to in his presence would be as much binding upon the real owner as if the suit had been brought by the real owner himself." There, no doubt, the previous suit had been *brought by* the *benamidar*, but I take it that the same principle equally applies where the suit is *against* the *benamidar*.

There is another case which may well be referred to in this connection; *viz.*, the case of *Panye Chunder Sircar* v. *Hurchunder Chowdhry* (4). There, the plaintiff had purchased the tenure from the registered tenant, but he did not get his name registered in the zemindar's office; subsequently the zemindar brought a suit

(1) I. L. R., 10 Calc., 697.
(2) I. L. R., 3 All., 812.
(3) I. L. R., 10 Calc., 697 (705).
(4) I. L. R., 10 Calc., 496.

for rent against the registered tenant, and, having obtained a decree, got the tenure sold; the plaintiff applied under section 311 of the Code to set aside the sale, but the application was rejected upon exactly the same ground that the application of the petitioner has been rejected, *viz.*, that he had no *locus standi;* and he thereupon brought a suit to set aside the sale. It was held by Field, J. that the ground upon which the application under section 311 had been rejected was erroneous; that in the absence of fraud the suit was not maintainable, for the plaintiff should have either satisfied the rent decree, or appealed against the order rejecting his application under section 311 of the Code; and that he was not entitled to treat the proceedings in the rent suit and the sale in execution as nullities, although he was not a party thereto. The Court accordingly dismissed the suit.

In the case of *Asmutunnissa Begum* v. *Ashruff Ali* (1) decided by a Full Bench of this Court, it would appear that the applicant under section 311 claimed the property sold under a conveyance from the judgment-debtor, prior to the attachment; and the question that was then considered was whether he was entitled to object to the sale, under that section. It was held that he was not so entitled. The Chief Justice in delivering the judgment of the Court observed as follows:—

"The words are 'any person whose immoveable property has been sold under that chapter may apply,' but the sale is not to be set aside unless the applicant proves that he has sustained substantial injury. We think that this means that the substantial injury must be the direct result of the irregularity, and that this could only be the case where the property of the person applying had not only been put up for sale and knocked down, but had been sold in the sense that the applicant's interest had been legally affected by such sale, as in the case of *Krishnarav Venkatesh* v. *Vasudev Anant* (2), but that a person claiming by title paramount to the judgment-debtor is not within the meaning of the words 'any person' in the section, inasmuch as his title to the property is not affected by the sale, whether it were regular or irregular, and therefore cannot apply to the Court to set aside the sale."

(1) I. L. R., 15 Calc., 488 (491). (2) 11 Bom. H. C., 15.

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The case before the Full Bench was, as has already been noticed, a case where the applicant claimed under a title acquired from the judgment-debtor *before* the attachment, so that upon the date of attachment and sale the property was not the property of the judgment-debtor, and therefore the sale could not possibly affect the applicant. But the case before us is wholly different. Here, the rent decree and the proceedings in execution thereof are absolutely binding upon the petitioner, if his allegation of *benami* be true, and therefore the sale must unmistakeably affect his interest in the property. In one sense no doubt he claims the property adversely to the judgment-debtor, but strictly speaking he claims it *through* him: what he says is that Kali Prosunno is but himself in another name.

Upon these grounds, I am of opinion that the Full Bench decision in the case of *Asmutunnissa Begum* v. *Ashruff Ali* (1) does not conclude the matter now before us, and that the Courts below are wrong in holding that the petitioner has no *locus standi*. The only doubt I entertained, however, was whether the Court could determine in this proceeding (the title of the petitioner being disputed) whether he has an interest in the property. But upon further reflection I think that for the purposes of section 311, the Court would have to determine, as a preliminary question, whether the petitioner has an interest in the property which would be affected by the sale. The remedy under section 311 of the Code is not confined to the decree-holder and judgment-debtor; and when any third party comes in upon the ground that his interest in the property has been affected by the sale, the Court cannot help determining whether he has such an interest in the property.

If this enquiry be shut out, and his application is rejected upon the ground that his ownership in the property is disputed, he may be debarred hereafter from obtaining relief upon any of the grounds mentioned in section 311 of the Code.

There being, however, a difference of opinion between my learned colleague and myself upon the main question raised in this rule, I think the case should be referred to a third Judge, and I may say that in this respect my learned colleague agrees with me.

(1) I. L. R., 15 Calc., 488.

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PETHERAM, C.J.—In this case I agree with the view taken by Mr. Justice Ghose, except on one point. Mr. Justice Ghose says that he does not think that the case is concluded by the decision of the Full Bench. I think it is, and I think that the decision of the Full Bench concludes the case in the way in which Mr. Justice Ghose has decided it, because that Full Bench case decided that any person might come in and make an application under section 311 to set aside a sale, if his interest were affected by the sale, in the sense that it would pass by the sale. In my opinion, if this is a good sale, the present applicant's interest passed under it, because his case is that Kali Prosunno Ghose, the name which appears on the zemindar's serishta and the name in which the rent suit was brought, was his *benamidar* and his servant, and was in fact another name for himself. If these things were proved, I think that a good title would be established as against the present applicant, Abdul Gani, because he does not claim by any title paramount to that person, but he says that that person is himself under another name.

Under these circumstances, I think upon the authority of the case in the Full Bench that the view taken by Mr. Justice Ghose is the correct view in this case, and the rule will be made absolute as proposed by him. The costs will abide the event.

A. A. C. *Rule made absolute.*

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

NILMONI SINGH DEO (PLAINTIFF) *v.* NILU NAIK AND ANOTHER (DEFENDANTS).*

1892 *September* 5.

Limitation—Act X of 1859, *s.* 33—*Discovery of fraud - Agency—Suit for an account and for money misappropriated by agent—Jurisdiction—Cause of action—Bengal Act VI of* 1862, *s.* 20—*Bengal Act I of* 1879, *s.* 146.

Where an agency for the collection of rents of *tokes G* and *H* was created in district *M*, in which district *toke G* was situated, *toke H* being

* Appeal from Appellate Decree, No. 793 of 1891, against the decree of C. M W. Brett, Esq., Judical Commissioner of Chota Nagpur, dated the 27th of April 1891, affirming the decree of Baboo Ram Saran Bhuttacharjee, Deputy Collector of Manbhum, dated the 30th of December 1889.