

*Before Mr. Justice Macpherson and Mr. Justice Beverley.*

RAM CHUNDER SADHU KHAN (DEFENDANT No. 1) v. SAMIR  
GAZI (PLAINTIFF) AND ANOTHER.\*

1892  
July 22.

*Sale for arrears of rent—Priority of auction purchasers—Sale set aside  
by an ex parte decree and afterwards confirmed—Notice.*

The plaintiff and the defendant purchased the same tenure at successive sales, held in execution of two decrees under the provisions of section 59 of Act VIII of 1869, for arrears of rent due in respect of different periods. Defendant's sale was first in point of time, but was set aside on the judgment-debtor obtaining an *ex parte* decree against the defendant. The suit was, however, restored and ultimately dismissed, and the defendant's purchase remained undisturbed. In the meantime, however, after the *ex parte* decree, but before the dismissal of that suit, the tenure had been again sold for further arrears of rent which had accrued before the defendant's purchase, and was bought by the plaintiff.

*Held*, that the defendant's title must prevail, being prior in point of time, and that the defendant was under no obligation to discharge the arrears of rent for which the second decree was obtained, or to give notice of his purchase to the plaintiff.

THE plaintiff sued to obtain possession of 23 bighas of land appertaining to a jama of Rs. 47 standing in the names of the defendants 10 and 11 and of one Hamid Gazi, and to have his right thereto declared by virtue of his purchase at an auction sale on the 9th August 1884. It appeared that the jama had previously been sold by the landlords in pursuance of a decree obtained by them against the tenant for arrears of rent for a period preceding 1288, and was purchased by the defendant No. 1 on the 13th November 1883. In May 1884 the defendants 10 and 11 and Hamid Gazi obtained an *ex parte* decree setting aside the sale, and shortly afterwards the jama was again brought to sale by the landlords in pursuance of another decree for arrears of rent due for the years 1288 and 1289, and the plaintiff purchased at that sale. An objection on the part of the judgment-debtors was disallowed on the 7th February 1885.

\* Appeal from appellate decree No. 1285 of 1891, against the decree of Bahoo Aghore Nath Ghose, Subordinate Judge of Jessore, dated the 5th of May 1891, affirming the decree of Bahoo Jogendro Nath Ghose, Munsiff of that district, dated the 7th of December 1889.

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On the 28th February 1885 an application on the part of the defendant No. 1 to have the *ex parte* decree of May 1884 set aside was rejected, but this order was on appeal reversed and the case was remanded for trial on the merits on the 21st April 1885.

On the 20th July 1885, however, the plaintiffs in that suit (the defendants 10 and 11 and Hamid Gazi) withdrew the case, so that the purchase of the 13th November 1883 remained undisturbed; the defendant No. 1 then entered upon the land and obtained rent decrees against several tenants of the mehal.

In consequence of this dispossession the plaintiff sued to establish his title under the sale of the 9th August 1884. The defendant No. 1 claimed priority by virtue of his purchase of the 13th November 1883, and charged that the decree, in execution of which the plaintiff purchased, was collusively obtained.

The Court of first instance decided in favour of the plaintiff's purchase, principally upon the ground that the defendants appeared to have been privy to a fraud of the judgment-debtors by reason of which the suit to set aside the sale of 1883, at which the defendant No. 1 purchased, was withdrawn. The lower Appellate Court upheld this decision upon another ground, observing:— "I am of opinion that the purchasers at the first sale should be taken to have constructive notice of the second decree; and that they, having neglected to protect the tenure from the second sale by depositing the decree-money, cannot now deprive the plaintiff, apparently a *bonâ fide* purchaser for value, of the fruits of his purchase. The defendant should have enquired as to whether the landlord's dues in respect of 1288 and 1289 had been paid, or whether the landlord had obtained a second decree or not. Such an enquiry, if prosecuted with ordinary diligence, might have presumably led them to the discovery of the real state of things, that is, that the tenure was to be sold in execution of a second decree, and enabled them to protect it from such a sale. Having failed to do so, they should not be considered to have, in the eye of equity, obtained a right superior to that of the plaintiff."

The defendant No. 1 appealed to the High Court.

Baboo Srinath Das and Babu Hara Prasad Chatterjee appeared for the appellant.

Baboo Saroda Churn Mitter appeared for the respondent.

The judgment of the High Court (MACPHERSON and BEVERLEY, JJc) was as follows :—

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This is a suit between two purchasers of a tenure at successive sales for arrears of rent. The tenure was sold on each occasion under the provisions of section 59 of the Rent Act (VIII of 1869); and the question is which of the two purchasers has the preferential title. The facts are shortly these. The landlord obtained a decree against his tenant for arrears of rent for a period preceding 1288. Subsequently he obtained another decree against the same tenant for the arrears of 1288 and 1289. In 1883, in execution of the first decree, he caused the tenure to be sold, and it was purchased by the defendant No. 1, who is the appellant in this Court. The tenant, the judgment-debtor, then obtained an *ex parte* decree against the auction-purchaser, by which that sale was set aside; and after it had been so set aside the landlord, under the second decree referred to above, caused the tenure to be again sold in execution, and it was on this occasion purchased by the plaintiff. Subsequent to the last sale the auction-purchaser, the defendant No. 1, on an application to the Court, got the suit in which the *ex parte* decree had been made against him restored, and after restoration it was dismissed in consequence of the judgment-debtor, who was the plaintiff in that case, withdrawing the claim.

It has been found that both the plaintiff and the defendant, the purchasers respectively under the two decrees, were *bonâ fide* purchasers, and that there was no fraud or collusion on the part of the defendant appellant in connection with the *ex parte* decree either as to his allowing it to be made in the first instance, or as to the restoration of the suit in which it was made, or as to the subsequent withdrawal of the claim in that suit.

The lower Appellate Court has decided in favour of the plaintiff on the ground that even if the first sale had been actually subsisting at the time when the second sale took place, as the rent was a charge on the tenure, the purchaser at the first sale, who must be presumed to have had notice of the second sale, ought to have paid into Court the amount that was due under the second decree, and had the sale stayed, and on that ground the Subordinate Judge considered that the plaintiff had an equitable right superior to that of the defendant.

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We are unable to concur in the view taken by the Subordinate Judge. The effect of the subsequent dismissal of the suit to set aside the sale was the same as if it had been dismissed in the first instance, and as if the first sale had never been set aside. We must take it that the *ex parte* decree was made without the knowledge of the auction-purchaser, the defendant No. 1, and that the suit in which it was passed was properly restored, there being no evidence to the contrary, and the Court below having found that the defendant was not guilty of any fraud or collusion in the matter. If, therefore, the first sale must be regarded as subsisting, it seems to us clear that the tenure could not be sold a second time in execution of a decree for rent which became due, not during the time of the purchaser, the defendant No. 1, but at a time antecedent to his purchase. The title vested in the purchaser at the first sale, which was afterwards duly confirmed, and he bought the tenure free of any charges which lay upon it at the time of the sale. We think that the defendant, even assuming that he had notice of the subsequent decree and of the sale in pursuance of it, was not bound to discharge the arrears of rent for which that decree was obtained, and by so doing to protect the property.

It has been argued before us that the decision of the lower Appellate Court ought to be upheld for the reason given by the Subordinate Judge, that the equitable consideration in favour of the plaintiff ought to prevail.

It is said that if the defendant had taken possession under his purchase that might have afforded notice to the plaintiff, and might have had the effect of preventing him from purchasing; or, that if after the second sale had taken place the defendant had intervened, the plaintiff might have got the sale at which he purchased set aside, and at all events recovered the money he had paid. But conceding that the defendant might have done that, we do not think that he was in any way bound to take that course; and it does not at all follow that he had any notice of the second decree or of the sale which took place in pursuance of it. We cannot say that there is any higher equity in favour of the plaintiff, and we think that as the first purchaser of the tenure the defendant is the person in whom the title is vested.

Under these circumstances we must allow the appeal, set aside the decree of the lower Courts, and dismiss the suit with costs throughout.

A. A. C.

*Appeal decreed.*

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*Before Mr. Justice Prinsep and Mr. Justice Banerjee.*

RAJBULLUBH SAHAI (DECREE-HOLDER) v. JOY KISHEN PERSHAD  
*alias* JOY LAL (JUDGMENT-DEBTOR) AND KHOOB LAL (OBJECTOR).\*

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 July 29.

*Limitation—Execution of decree—Application for transmission of decree—  
 Step in aid of execution—Proceedings bonâ fide in Court without  
 jurisdiction—Limitation Act (XV of 1877), sec. 14, para. 3.*

On the 2nd March 1887, *S* obtained a mortgage decree against *P* in the Court of the Munsiff of Hajipore. On the 9th September 1887, *S* applied for execution, and on the 7th November 1887 the mortgage property was sold by the Hajipore Court. On appeal, on the 2nd September 1890, the High Court set aside the sale on the ground of want of jurisdiction. Thereupon, on the 6th September 1890 *S* applied to the Hajipore Court to transfer the decree for execution to the Munsiff's Court at Muzaffarpur. On the 19th December 1890 *S* applied for execution to the Muzaffarpur Court. *L*, who had meanwhile purchased the mortgaged property from *P*, objected that the application was barred.

*Held*, that the application was not barred, as the application of the 6th September 1890 was a step in aid of execution, and also as section 14, para. 3 of the Limitation Act, clearly applied to the facts of the case, and under it the decree-holder was entitled to a deduction of all the time occupied in executing the decree in the Court having no jurisdiction, the application having been manifestly made in good faith.

*Nilmony Singh Deo v. Biressur Banerjee* (1) distinguished.

*Latchman Pundeh v. Maddan Mohun Shye* (2) referred to.

On the 2nd March 1887, Rajbullubh Sahai obtained a mortgage decree against Lala Joy Kishen Pershad in the Court of the Munsiff of Hajipore. The decree directed that if the

\* Appeal from order No. 293 of 1891, against the order of B. G. Geidt, Esq., District Judge of Tirhut, dated the 22nd of July 1891, reversing the order of Babu Bepin Behary Ghose, Munsiff of Muzaffarpur, dated the 23rd of May 1891.