1901
FEB. 12.

FULL BENCH.

29 C. 675.

AMEER ALI J. The question which has been referred to us is one purely of interpretation.

When the case of *Basanta Kumar Roy Chowdhry* v. *Promotha Nath Bhuttacharjee* (1) came before me and Mr. Justice Pratt, we dealt with it as *resintegra*, and in construing s. 179 of the Bengal Tenancy Act expressed ourselves with reserve, as will appear from the concluding words of our judgment, which are as follows :—

"For these reasons, as at present advised, we think that the conclusion arrived at by the Subordinate Judge in this case is correct, and this appeal must be dismissed with costs."

Having regard to the arguments of learned Counsel for the respondent, speaking for myself, I should have liked to have had some opportunity of considering the matter further. Although the judgments of my learned colleagues make me feel some doubt regarding the view I then expressed, it seems to me that s. 179 of the Tenancy Act requires to be reconciled with the other provisions of the Tenancy Act. As I have ventured to point out in my judgment in *Basanta Kumar Roy Chowdhury* : " It is a well-recognized principle in the Interpretation of Statutes that an Act of the Legislature should be so construed as to give effect so far as possible, to all its enactments, nor must it be so construed as to allow one provision to stultify another." I have not heard any argument to-day to induce me to alter that opinion. S. 179 of the Bengal Tenancy Act therefore has to be reconciled with the provisions of clause (*h*) of the third proviso of s. 178 **[681]** and I think the only way in which we can reconcile them is by reading s. 179, as suggested by Dr. Rash Behari Ghose : in other words, s. 179 should be read as follows :—

"That nothing in this Act shall be deemed to prevent a proprietor or a holder of a permanent tenure in a permanently settled area from granting a permanent *mocurari* lease or any terms agreed on between him and his tenant, so far as they are not in conflict with the provisions of this Act."

RAMPINI, J. I think it is sufficient for me to say that I agree with the views of the majority of the learned Judges constituting this Bench, and I would accordingly answer the first part of the question referred to us in the affirmative, that is to say, I consider that the plaintiff is entitled to recover interest at the rate specified in the *kabuliat* executed by the defendant, and I would answer the second part of the question in the negative, that is to say, I do not consider that s. 67 of the Bengal Tenancy Act controls the provisions of s. 179 of that Act, but, on the contrary, that s. 179 controls the provisions of s. 67. I also consider that the case of *Basanta Kumar Roy Chowdhry* v. *Promotha Nath Bhuttacharjee* (1) has not been rightly decided.

Appeal dismissed.

29 C. 682.

[682] APPELLATE CIVIL.

Before Mr. Justice Hill and Mr. Justice Brett.

BARODA KANTA BOSE v. CHUNDER KANTA GHOSE.*

[25th June, 1902.]

Suit for possession—Benamidar—Beneficial owner—Party—Whether, in a proceeding for setting aside a sale, the beneficial owner is a necessary party—

* Appeal from Appellate Decree No. 1606 of 1899, against the decree of Babu Debendra Lall Shome, Subordinate Judge of Khulna, dated the 16th of June 1899, affirming the decree of Babu Monmohun Neogy, Munsiff of Bagirhat, dated the 19th of September 1898.

(1) (1898) I. L. R. 26 Cal. 130.

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Execution proceedings—Benamidar—Civil Procedure Code (Act XIV of 1882), ss. 244, 311 and 487.

A beneficial owner is not a necessary party to a proceeding for setting aside an execution sale.

It is competent to the Court to set aside the sale finally and conclusively as against the beneficial owner, although his *benamdar* only, and not he, is made a party to the proceeding.

THE plaintiffs Baroda Kanta Bose and, on his death, his heir and legal representative Sarat Chunder Bose and others appealed to the High Court.

This appeal arose out of an action brought by the plaintiffs to recover possession of certain immoveable property on declaration of their title thereto. The allegation of the plaintiffs was that the defendants Nos. 1 and 3 to 14 and the predecessors of defendants Nos. 2, 5 and 6 owned the *jama* standing in the name of one Tularam Ghosh under Radhica Chowdhurani and her co-sharers ; that Radhica Chowdhurani had obtained a decree for arrears of rent due to her own share and had caused the *jama* to be sold, and the plaintiffs had purchased it at the auction sale in the *benami* of Natabar Ghose, father of defendant No. 30, on the 5th February 1886 ; but neither the plaintiffs nor their *benamdar* had ever obtained possession of the property; and that the defendants, who were tenants under the defaulters, had kept them out of possession : hence the suit. The defence, **[683]** *inter alia*, was that the defendants never had any knowledge of the sale under which the plaintiffs claimed and that the suit and decree of Radhica Chowdhurani as well as the sale in execution were all fraudulent. Shortly after the institution of the present suit, some of the defendants applied under ss. 244 and 311 of the Civil Procedure Code to the Munsiff of Bagirhat to have the sale of the 5th February, 1886, set aside on the ground of fraud and material irregularity. Both the decree-holder and the *benamdar*, Natabar Ghose, had died in the meantime, and their legal representatives were made parties respondent. The Munsiff rejected the application ; but, on appeal, the Subordinate Judge set aside the sale of the 5th February, 1886. There was an appeal to the High Court, which ultimately affirmed the decision of the Subordinate Judge setting aside the sale on the ground of fraud. In consequence of the sale, under which the plaintiffs claimed, having been set aside, the Munsiff held that they (the plaintiffs) had no longer any interest in the disputed property and that the present suit was therefore not maintainable. He accordingly dismissed the suit. On appeal, the Subordinate Judge of Khulna, Babu Debendra Lal Shome, affirmed the decision of the first Court.

Dr. *Ashutosh Mukerjee* and Babu *Biraj Mohun Mozumdar* for the appellants.

Babu *Nil Madhub Bose* and Babu *Chandra Kanta Sen* for the respondents.

HILL, J. The only question argued in this appeal was whether the appellants, the plaintiffs in the suit, are bound by a certain order, whereby a sale of the property in suit held in execution of a decree was set aside. If they are so bound, then admittedly their suit fails and this appeal must likewise fail.

The property in question, a *jama* comprising some 22 bighas of land, was held by some of the present defendants under one Radhica Chowdhurani and certain other persons, who were co-sharers with her in the zemindari. Radhica Chowdhurani obtained a decree against those

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defendants to the extent of her share in the zemindari for arrears of rent and, on the 5th February [684] 1886, brought the *jama* to sale in execution of her decree. It was purchased by one Natabar Ghose, the father of defendant No. 30, as *benamdar* for the plaintiffs, but neither he nor the plaintiffs ever obtained possession. The present suit was instituted, on the 3rd February, 1898, for a declaration of the plaintiffs' title as purchasers at the sale of the 5th February, 1886, and for possession. It was pleaded, *inter alia*, by the above-mentioned defendants, in answer to the suit, that they never knew of the sale under which the plaintiffs claimed and that the suit and decree of Radhica Choudhurani as well as the sale in execution were all fraudulent. One of the issues (the 8th) framed by the Court of First Instance raised the question whether the plaintiffs had purchased the property in suit, and whether, if so, they acquired a title to it by their purchase.

Shortly after the suit was instituted, two of the same defendants applied under ss. 244 and 311 of the Code of Civil Procedure to the Court of the Munsiff of Bagirhat to have the sale of the 5th February, 1886, set aside on the ground of fraud and material irregularity, making the legal representatives of the decree-holder and of Natabar Ghose, both of whom had in the meantime died, parties respondent. The Munsiff dismissed this application; but, on appeal, his order was, on the 5th September, 1898, reversed by the Subordinate Judge and the sale set aside. There was then an appeal to this Court, which resulted in a remand to the Subordinate Judge for trial of the application on the merits. The Subordinate Judge on remand again ordered that the sale be set aside, on this occasion as being fraudulent, and his order was affirmed on a further appeal to this Court.

In the meantime, namely, on the 16th September, 1898, the Munsiff delivered judgment in the suit. It appears that the 13th, 16th and 17th defendants had, prior to that date, entered into a compromise with the plaintiffs, by which the claim of the latter was admitted, and the suit was, as against them, accordingly, decreed in terms of the compromise. But, as regards the remaining defendants, the Munsiff, founding himself on the order of the Subordinate Judge of the 5th September, held that, in consequence of the sale under which the plaintiffs claimed having been set aside, they had no longer any right to the property sold, and that [685] the suit was therefore no longer maintainable. He accordingly dismissed it. The Subordinate Judge, on appeal, affirmed this decision, and hence the present appeal.

Neither of the Courts, it is therefore apparent, has decided the suit precisely on its own merits and the question now before us virtually is, whether they ought not to have done so. It has been found by the Munsiff, and his findings have been adopted by the Subordinate Judge, that the plaintiffs were the actual or beneficial purchasers at the sale of the 5th February, 1886. Natabar Ghose, the nominal purchaser, having been their *benamdar*, and that by the sale they acquired a title to the property. He has further found that, at the time when the defendants applied to have the sale set aside, they knew that Natabar Ghose was a *benamdar* for the plaintiffs, but they did not, although they ought to have done so, make them parties to the application; and, lastly, he has found that the plaintiffs assisted (for that, I take it, may be said to be the meaning of the expression "made *tadbir*" used by the Munsiff) the opposite party, that is, the representative of Natabar Ghose, in the proceedings

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for the setting aside of the sale. The last finding has been qualified to some extent by the Subordinate Judge, whose finding on the point is that the plaintiffs or some of them conducted those proceedings for Natabar Ghose (*sic*). He had not, however, indicated which of the plaintiffs acted in this way, which might have led to difficulties, since three out of the six plaintiffs were, at the time the suit was instituted and therefore presumably at the time of the application, minors, and he has held all the plaintiffs bound by the order setting aside the sale as being, in effect, parties by reason of the action of those of their number, who were concerned in the conduct of the proceedings. Whatever the legal consequences of such intervention might be upon the position of the actual intervenors, it could hardly affect the rights of those of the plaintiffs, who did not intervene.

Leaving that point, however, for the present, the main point of contention between the parties was, whether it was necessary, in order to bind the plaintiffs by the order setting aside the sale, that they should have been parties to the antecedent proceedings. It was said on the one hand that, for all purposes connected with the recision of an execution sale, it is necessary only to bring **[686]** before the Court, as the auction-purchaser, the person in whose name the sale certificate has been issued; that he is the purchaser in the eye of the law, and the only person, whom the Court can recognize as filling that character. On the other hand, the contention of the appellants was that they, not having been parties to the proceedings, could not be bound by an order made behind their backs; that it was *res inter alios acta*, and that there was no estoppel, inasmuch as the defendants, when they applied under s. 311, were well aware that the appellants were the real purchasers. If the decision of the case had depended on the application of ordinary principles, these would, I think, be very weighty considerations in favour of the appellants. But I think that questions of this kind are excluded in a case such as we now have before us, which depends on the provisions of the Code of Civil Procedure with respect to sales in execution, and that the learned Subordinate Judge was right in holding that the plaintiffs were not necessary parties to the proceedings for setting the sale aside. It was, in other words, in my opinion, competent to the Court to set the sale aside finally and conclusively as against the plaintiffs, although their *benamdar* only (and not they) was a party to the proceedings and notwithstanding the knowledge of the defendants. I have arrived at these conclusions with some hesitation, since they may appear to conflict with principles of law and justice which are everywhere recognized. But the plaintiffs, after all, have only themselves to thank for any difficulty in which they may now find themselves.

A sale in execution differs in many essential particulars, as need hardly be said, from a sale *inter partes*. It is not a sale by the owner of the property, but by a Court which has a statutory power conferred upon it of transferring the interest of the judgment-debtor to the purchaser, and to that end a certain course of procedure is prescribed terminating with the sale certificate, which confers on the persons named therein his title. The statutory title so created is, I think, all that the Court of execution is concerned with when, after confirmation, the sale is impugned by the judgment-debtor. As between the person named in the certificate and a third person, there may be a trust by virtue of which the former holds the property sold as trustee **[687]** for the latter; but with the ulterior consequences of the

sale, as between the certified purchaser and a third party, I do not think the Court has anything to do, and that this was the intention of the Legislature seems to me to be indicated by the provisions of s. 317 of the Code, which prohibit a suit for the purpose of establishing, as against the certified purchaser, that the purchase was made on behalf of a person other than himself. If such a suit is prohibited, it implies, I think, that in all questions affecting the validity of the sale, the certified purchaser is alone to be regarded by the Court of execution as the person who has purchased the property, and it seems to follow that, if the beneficial owner is debarred from asserting his rights by suit as against the certified purchaser, he cannot indirectly effect the same object by coming in in a proceeding set on foot by the judgment-debtor for the purpose of setting aside the sale and in it assert his rights. If these views be correct, there seems to be no reason why a Court which has been induced by fraud to vest the title in a particular person (that being the allegation in the present case) should not, on being satisfied of the fraud and having that person before it, undo what it has done—or annul the transfer, in other words; and, if the actual transfer be annulled, any equitable interests depended upon it and existing as between the purchaser and his beneficiary, must go with it. This would be so, speaking generally, in the case of an ordinary sale to a trustee. If it were sought by the vendor in such a case to set aside the sale on the ground of fraud, it would not be necessary to make the persons, for whose benefit the purchase was made, parties to the suit (*vide* s. 437 of the Code, and the reasons for the application of this principle in the case of execution sales seem to me to be still stronger.

I do not think that the question of estoppel, as I have already mentioned, comes in at all, except perhaps to this extent that the beneficial owner, having held out his *benamdar* at the time of the sale as the actual purchaser, ought not to be allowed in the course of the same proceedings to withdraw from that position. But, if the Court had the proper parties before it, as I think, for the reasons I have mentioned, it had, it was immaterial that other persons were interested in the sale. Those persons may not, in **[688]** one sense, be bound by an order made in a proceeding to which they were not parties, but the result is the same if, in consequence of their having purchased through a *benamdar*, their title was capable of being annulled in their absence.

I should hesitate, in view of the nature of the finding of the Subordinate Judge with respect to the part taken by the plaintiffs in the proceedings relating to the setting aside of the sale, to express any definite opinion upon that question. He would seem, however, to have gone too far in holding that, merely because some of the plaintiffs conducted the case on behalf of the representative of the certified purchaser, they were to be regarded as parties and so bound. In many respects their position was very different from that of actual parties. But the Subordinate Judge seems to have regarded them as bound by some species of estoppel. He has not, however, found the facts necessary to raise an estoppel even in the case of those of the plaintiffs who did, in fact, take part in the conduct of the case; and, as regards the minor plaintiffs, they would not ordinarily be bound by an estoppel. For the reason, however, which I have given above, I think that the appeal fails and ought to be dismissed with costs.

BRETT, J. I agree.

Appeal dismissed.