

1904
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APPELLATE
CIVIL.

31 C. 499.

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[499] APPELLATE CIVIL.

Before Mr. Justice Stevens and Mr. Justice Mitra.

CHANDAN SINGH v. RAMDENI SINGH.*

[17th February, 1904.]

Sale—Decree—Execution—Purchase by decree-holder—Effect of reversal of decree upon sale in execution—Civil Procedure Code (Act XIV of 1882), s. 244.

A obtained a decree against B for rent. B appealed and questioned only the rate of rent. Pending the appeal A took out execution, sold B's property and purchased it himself. Subsequently B's appeal was allowed and the decree was modified, and he applied to set aside the sale under s. 244 of the Civil Procedure Code.

Held, that, inasmuch as the Appellate Court set aside the decree and made a new decree in lieu of the decree passed by the First Court, the sale having taken place in execution of the decree, which was set aside by the Appellate Court could not stand.

Zainul-abdin Khan v. Muhammad Asghar Ali Khan (1) and *Set Umedmal v. Srinath Ray* (2) referred to.

[*Ref.* 6 C. L. J. 32; 6 C. L. J. 102; 13 C. W. N. 710; 36 Cal. 336 (P.C.); 51 I.A. 959=29 C. L. J. 486; 37 Cal. 107; 20 C. L. J. 469=27 I. C. 139=19 C. W. N. 537; 19 C. W. N. 240=21 C. L. J. 88=27 I. C. 715.]

SECOND APPEAL by judgment-debtors, Chandan Singh and others.

This appeal arose out of an application to set aside a sale under sections 244 and 311 of the Civil Procedure Code. One Ramdeni Singh obtained a decree for rent against Chandan Singh and in execution thereof the decree-holder sold the judgment-debtor's property and purchased it himself on the 14th March, 1902. The sale was confirmed on the 22nd April, 1902. The judgment-debtor appealed against the decree and questioned the rate of rent. On appeal the decree was modified on the 2nd June 1902, and the decretal amount was reduced by about a third. [500] Subsequently the aforesaid application was made by the judgment-debtor to set aside the sale mainly on the ground that as the sale was held in execution of the original decree passed against him and that as the decree was modified on appeal, the sale was liable to be set aside. The Court of First Instance holding that inasmuch as the decree-holder was the purchaser, on reversal of the original decree, the sale was liable to be set aside, set aside the sale. On appeal, by the decree-holder purchaser, the learned District Judge of Shahabad reversed the decision of the first Court.

Babu *Makhan Lal*, for the appellant. The decree of the first Court having been modified by the Appellate Court, and a new decree having been made, the sale could not stand; see the cases of *Sadasivayyar v. Muttu Sabapathi Chetti* (3) and *Set Umedmal v. Srinath Ray* (2).

Babu *Umakali Mookerjee* (with him *Babu Rajendra Chander Chuckerbutty*) for the respondent. The cases relied upon by the other side are not applicable to the facts of the present case. In these cases the decrees were wholly reversed and not modified. Of course where the decree is reversed, a sale under it, to a decree-holder as distinguished from a

* Appeal from Order No. 254 of 1903, against the order of H. R. H. Coxe, District Judge of Shahabad, dated the 14th of April 1903, reversing the order of R. K. Naug, Munsif of Arrah, dated the 17th of January 1903.

(1) (1887) I. L. R. 10 All. 166; L. R. (2) (1900) I. L. R. 27 Cal. 810.
15 I. A. 12. (3) (1881) I. L. R. 5 Mad. 106.

stranger to the suit, must be set aside. But there is no reason whatever why the same principle should be extended to the case of a decree, which is only modified, but not reversed. From an equitable point of view also it is proper that the sale should not be set aside when the decree is slightly modified, because the decree-holder will then have to go over the same process again for realizing his money. Whereas, if the sale is not set aside on the decree being modified, the judgment-debtor will be entitled to get the amount of difference. Further the judgment-debtor could have protected himself, if he had a mind to do so, by depositing the decretal amount and asking for stay of execution pending the appeal.

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STEVENS AND MITRA, JJ. The plaintiff-respondent obtained a decree for rent against the defendants-appellants on the 6th December, 1901. The defendants unsuccessfully questioned in the [501] first Court the rate of rent on the basis of which the plaintiff had laid his claim and they preferred an appeal which was decided in their favour on the 2nd June 1902. In the meantime and before the decision of the Appellate Court, the plaintiff brought the holding to sale in execution of his decree. The sale took place on the 14th March 1902 and it was confirmed on the 22nd April. The plaintiff afterwards took possession of the property purchased by him. Thereafter an application was made by the defendants under section 244 of the Code of Civil Procedure to have the sale set aside.

Their main contention was that the decree under which the sale had taken place had been practically reversed and that they were entitled to have the sale set aside on that ground.

The Munsif gave effect to their contention and held, relying on the cases of *Sadasivayyar v. Mutta Sabapathi Chetty* (1) and *Set Umedmal v. Srinath Ray* (2), that the sale could not stand.

The plaintiff appealed to the District Judge, who dismissed the defendant's application and confirmed the sale holding that, inasmuch as the decree was not reversed, but was only modified, the sale could not be set aside upon the authorities referred to by the Munsif.

The present appeal is against this decision of the District Judge; and the defendants repeat the contention which they urged in the lower Courts.

It is now settled law that, when a decree-holder purchases under his decree and the decree is afterwards reversed in appeal, he is not entitled to the benefits of the execution proceeding and the sale thereunder. The principle is distinctly laid down by the Judicial Committee in the case of *Zainul-abdin Khan v. Muhammad Asghar Ali Khan* (3) and has been followed in a case somewhat different in *Set Umedmal v. Srinath Ray* (2). In the latter case the decree-holder under an *ex-parte* decree brought the Judgment-debtor's property to sale and the sale was confirmed. Afterwards the judgment-debtors applied to have the decree set aside under section 108 of the Code of Civil Procedure. The decree was set aside, but was restored on the second hearing of the case. The sale, however, which had taken place under the first decree, [502] was set aside, because the precise decree under which the sale had been held had been set aside on the application under section 108 of the Code of Civil Procedure.

(1) (1881) I. L. R. 5 Mad. 106.
(2) (1900) I. L. R. 27 Cal. 840.

(3) (1887) I. L. R. 10 All. 166; L. R. 15 I. A. 12.

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In the case before us, the Appellate Court set aside the decree and made a new decree, in lieu of the decree passed by the Munsif. The sale had taken place in execution of the decree, which was set aside by the Appellate Court; and we can see no distinction in principle between the present case and the case of *Set Umedmal v. Srinath Ray* (1). We think the same principle applies and the District Judge has erred in the view he has taken in reversing the decision of the Munsif.

We therefore restore the decision of the Munsif with costs.

Appeal allowed.

31 C. 503 (=31 I. A. 75=14 M. L. J. 15?=8 C. W. N. 425=8 Sar. 611).

[503] PRIVY COUNCIL.

BHOLA NATH NUNDI v. MIDNAPORE ZEMINDARY CO.*

[13th November, 1903 and 26th February, 1904.]

APPEALS CONSOLIDATED.

[*On appeal from the High Court at Fort William in Bengal.*]

Pasturage—Cultivators—Indigo concern—Zemindars—Waste lands—Decree, form of.

The plaintiffs, resident cultivators of villages belonging to the defendants, the proprietors of an indigo concern, claimed a right of free pasturage over the waste lands of the villages, and the Subordinate Judge made a decree in accordance with the finding of the two lower Courts, that the plaintiffs had enjoyed the right without interruption from time immemorial.

The High Court, in second appeal, differing as to the nature of the right and the character in which it was claimed, set aside the decree and made an order of remand for the case to be decided in accordance with their remarks.

On appeal the Judicial Committee discharged the order of remand as unnecessary and restored the decree of the Subordinate Judge with the addition of a clause that the decree should not prevent the defendants or their successors in title from cultivating or executing improvements upon their waste lands, so long as sufficient pasturage was left for the plaintiffs.

Held (agreeing with the judgment of the High Court) that the right claimed was not a right in gross.

[*Ref.* 6 C. L. J. 218; 13 C. W. N. 735=19 I. C. 890; 39 I. C. 868=2 Pat. L. J. 923; 53 I. C. 213=37 M. L. J. 284=26 M. L. T. 223=1919 M. W. N. 640; 20 I. C. 467. *Rel. on.* 2 Lah. L. J. 44.]

CONSOLIDATED appeals from seven decrees (22nd March 1898) of the High Court at Calcutta, which set aside seven decrees (12th November 1895) of the Subordinate Judge of Midnapore, by which decrees (14th May 1895) of the Munsif of Garbetta in seven suits were affirmed with slight modifications.

The plaintiffs appealed to His Majesty in Council.

The suits were brought on 14th May 1894 by seven different sets of plaintiffs, who were resident cultivators of certain villages situate in *turuf Paschim*, the whole of which was held in [504] *patni* right by the respondent Company, who carried on an indigo concern.

The plaintiffs claimed the right of free pasturage over certain portions of the land held by the respondent Company. The Company had been unable to induce the cultivators of the villages to grow indigo for them, in consequence of which they suffered loss. They therefore

* *Present* :—Lord Macnaghten, Lord Lindley, Sir Andrew Scoble, and Sir Arthur Wilson.

(1) (1900) I. L. R. 27 Cal. 810.