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GOLAM AHAD CHOWDHRY v. JUDHISTER CHUNDRA SHAHA.*

[25th July, 1902.]

Sale—Civil Procedure Code (Act XIV of 1882) ss. 244 and 311—Fraud—Execution proceedings—Partition—Mortgage.

After a sale has been confirmed, an application to set it aside for fraud is maintainable under s. 244 of the Civil Procedure Code.

Malkarjun v. *Narahari* (1) explained.

A co-sharer who has obtained a portion of the mortgaged properties on a partition after the execution of a mortgage bond by the other co-sharers hypothecating their undivided shares in the said properties, and who has been made a party to the mortgage suit, is a necessary party to the execution proceedings.

The sale of his share of the property, held in execution of a decree obtained in his presence upon the mortgage bond, is not a nullity, although he was not made a party to the execution proceedings ; but can be set aside in a proceeding properly set on foot for that purpose.

Ram Chandra Mukerjee v. *Ranjit Singh* (2) referred to

[Ref. 33 Bom. 698=11 Bom. L. R. 1113=4 I. C. 253.]

THE petitioner, Golam Ahad Chowdhury (defendant No. 5), appealed to the High Court.

This appeal arose out of an application to set aside a sale by one Golam Ahad Chowdhury under ss. 244-311 of the Civil Procedure Code.

The petitioner alleged that the decree-holders in the execution case No. 81 of 1895 caused the sale of his properties to be clandestinely held without publication of any sale proclamation ; that the decree in execution of which the sale took place was not made absolute under the provisions of the Transfer of Property Act and the execution proceedings were illegal : that the decree-holders in collusion with the serving peon caused the [143] notices to be concealed and without service in due manner fraudulently brought to sale the properties of the judgment-debtors worth not less than Rs. 50,000 and themselves purchased the same for Rs. 7,332 ; that by the said execution sale no property could be sold other than what fell into the share of the original debtor upon partition of the right which the original debtor had in the mortgaged properties and which was divided amongst the co-sharers by an *ekrarnama* before the institution of the mortgage suit by the plaintiff.

It appeared that two persons, Nurunissa Khatum and Momtazuddin Mohammed Chowdhry, executed a mortgage bond in favour of one Judhister Shaha and others on the 20th Sravan 1287 B.S., whereby Nurunissa Khatum, who was interested to the extent of 1 anna and 5 gandas, as one of the several co-sharers in between 600 and 700 parcels of land, mortgaged her undivided interest therein, her co-obligor joining in the bond on his personal security. Subsequently by an *ekrar* the co-sharers partitioned the property, and under the partition the petitioner became exclusively entitled to a large number of the parcels affected by the mortgage. In the year 1887 the mortgagees brought a suit upon the said mortgage bond against the mortgagors as well as the remaining co-sharers in the property. The petitioner was made the fifth defendant

* Appeal from Order No. 289 of 1900, against the order of Babu Chandra Kanta Roy, Subordinate Judge of Backergunge, dated the 12th of May 1900.

(1) (1900) I. L. R. 25 Bom. 337. (2) (1899) I. L. R. 27 Cal. 242.

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in the suit. The plaintiffs in the plaint alleged that a partition had been made of the mortgaged properties between Nurunissa Khatum, defendant No. 1, and the defendants Nos. 3 to 7, by virtue of an *ekrar* which they claimed to be invalid, and asked for a mortgage decree in the terms provided for in the Transfer of Property Act, but did not ask for any relief specifically in respect of the *ekrar*.

On the 5th February 1887, the Court passed a decree in the terms prayed for, and on the 23rd May 1888, the decree was made absolute. This decree was executed against the defendants Nos. 1 and 2 or their representatives only, without making the petitioner, defendant No. 5, a party to any of the proceedings. On the 25th November 1895, the mortgaged properties, with one or two exceptions, were sold and were purchased by the decree-holders, the sale being confirmed on the 20th January 1900. Subsequently another of the mortgaged properties was sold in [144] execution of the decree and was purchased by the decree-holders. After obtaining a sale certificate in respect of this property purchased at the second sale, the decree-holders executed a conveyance on the 29th November 1897 to one Sorwar Jan of all the properties purchased by them at the abovementioned sales, and they also assigned the decrees to Messrs. Garth and Weatherall, as trustees for the said Sorwar Jan. On the 22nd January 1900, two days after the confirmation of the sale which took place on the 25th November 1895, the present application was made by defendant No. 5 for setting aside the said sale.

The learned Subordinate Judge rejected the application without dealing with the question of the validity of the sale or disposing of the charges of fraud brought by the applicant against the decree-holders, but at the same time declared that the sale must be ineffectual in affecting the petitioner's right, if he had any.

Dr. *Ashutosh Mookerjee* and Babu *Surendra Nath Guha* for the appellant.

Mr. *J. T. Woodroffe* (*Advocate-General*) and Babu *Dwarka Nath Chuckerbutty* for the respondent.

HILL AND BRETT, JJ. This appeal is against an order of the Subordinate Judge of Barisal, dated the 12th May 1900, refusing, on the application of the appellant, to set aside a sale held in execution of a decree.

The application was made under the following circumstances so far as we have been able, from the somewhat scanty materials at our disposal, to ascertain them. On the 20th Srabun 1287, two persons, Nurunissa Khatum and Momtazuddin Chowdhry, who may conveniently be referred to as the mortgagors, executed a bond to the respondents, whereby the former, who was interested to the extent of 1 anna 5 gandas, as one of several co-sharers in between 600 and 700 parcels of land, mortgaged her undivided interest therein to secure the repayment of a sum of Rs. 11,000 her co-obligor joining in the bond on his personal security. Subsequently by an *ekrar*, the date of which does not appear, the co-sharers partitioned the property, and under the partition the [145] appellant became exclusively entitled to a large number of the parcels affected by the mortgage.

In the year 1887, the mortgagees sued in the Court of the Subordinate Judge of Barisal for the enforcement of their mortgage, making the mortgagors, as well as the remaining co-sharers in the property, defendants to the suit. The present appellant was the fifth in the array

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of defendants. In the sixth paragraph of the plaint, the following passage occurs:—"After the execution of the mortgage, the defendants Nos. 3 to 7 and the defendant No. 1 having executed an *ekrar*, which it was not within their power to do, the defendants Nos. 3 to 7 have made a division of and taken the mortgaged properties. As this is invalid, the defendants Nos. 3 to 7 have been made parties, so that the suit may be tried in their presence." The plaint concludes with the usual prayers for a decree for the amount claimed; for a declaration that the properties subject to the mortgage were liable for the amount decreed; and for realization of the decretal amount by sale of the mortgaged properties as well as from the mortgagors personally. No relief was asked for specifically in respect of the *ekrar*.

The suit was not defended by the "co-sharer" defendants, and on the 5th February 1887, the Court made its decree substantially in the terms of the prayers contained in the plaint. On the 23rd May 1888, this decree was made absolute. There were afterwards numerous applications for execution, to which it is unnecessary to refer more particularly, but on the 25th November 1895, the mortgaged properties, with one or two exceptions, were brought to sale on the application of the decree-holders in execution of their decree, and were purchased by them. The sale was not, however, then confirmed. In the following year a further application for sale was made, and another of the mortgaged properties was brought to sale and was also purchased by the decree-holders. Then we are informed that on the 23rd November 1897 the decree-holders assigned their decree to two gentlemen, Messrs. Garth and Weatherall, as trustees for a person named Sorwar Jan and on the same date executed a conveyance to Sorwar Jan himself of all the properties purchased by them at the above-mentioned sales. In respect of the property purchased at the second sale, a sale certificate had then been issued. But the sale of the properties comprised in the earlier sale had not up to the date of the conveyance to Sorwar Jan [146] been confirmed, and the decree-holders accordingly covenanted with him that, on his paying the necessary expenses, they would take the steps requisite for the purpose of procuring sale certificates in respect of these properties. This, however, was not done until the 20th January 1900. All the proceedings referred to above were prosecuted by the decree-holders as against Momtazuddin Chowdhry and Nurunissa Khatum, the mortgagors, and after the death of the latter, as against her representatives; neither the appellant nor any of the remaining co-sharers in the mortgaged properties having received notice of them, or been made parties to them, and it is on this ground mainly that the appellant now calls in question the validity of the sale of the 25th November 1895. His application to the Subordinate Judge, which was filed on the 22nd January 1900, two days after the confirmation of the sale, was preferred under the provisions of sections 244 and 311 of the Code of Civil Procedure, his case, stated generally being that the suit on the mortgage and all the subsequent proceedings in execution were fraudulently kept from his knowledge by the decree-holders; that it was only some few days prior to the date of his application that he came to know either of the suit or the sale in execution, and that the sale was invalid in consequence of his not having been made a party to the proceedings in execution. He also sought to impugn the sale on the ground that the decree-holders were not entitled to bring to sale any of the properties save those which fell

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to the lot of their mortgagor under the partition effected by the *ekrar*. The learned Subordinate Judge rejected the application without however, dealing with the question of the validity of the sale or disposing of the charges of fraud brought by the applicant against the decree-holders. At the same time, he declared, on the authority of *Ram Chandra Mukerjee* v. *Ranjit Singh* (1), that the sale could not affect the right of the appellant in any way, as, notwithstanding the partition, he had not been made a party to any of the execution proceedings. Both parties appealed to this Court against this order. The appeal of the decree-holders has been dismissed, and we are not now concerned with it; that of the fifth defendant, which is now before us, raises the question whether, in view of the circumstances set forth above, the sale of the 25th [147] November 1895 can stand good. It is conceded that the Subordinate Judge had not authority, without setting aside the sale, to make the declaration contained in his order, the practical effect of which is to render the sale nugatory in so far as the property allotted to the appellant on the partition is concerned, but it is contended that the sale is bad, and ought to be vacated, because the appellant was not made a party to the proceedings in execution under which his property was sold, and further, that if this is not so, the sale ought to have been set aside on the other grounds set forth in the appellant's petition.

Before considering these questions, it may be well to refer to an objection raised by the respondent's learned counsel to the competency of the application made by the appellant to the Lower Court. It was said that the sale having been confirmed, the appellant's remedy was not by an application under section 244 or 311 of the Code, but by suit, and reference was made in support of this contention to *Malkarjun* v. *Narhari* (2). Their Lordships there, no doubt, indicate a suit as a means by which the sale in execution then in question might have been set aside. They say: "It may be that the plaintiffs could unite a suit to set aside with one to redeem, and that the defendants' anticipatory plea of misjoinder would, if tried, have been overruled," and again later on in their judgment: "But if the sale is a reality at all, it is a reality defeasible only in the way pointed out by law, and it seems to their Lordships that the case must fall either within section 311 of the Code or within article 12 (*a*) of the Limitation Act of 1877." Their Lordships were, however, dealing with a sale which was impeachable on the ground solely of an irregularity, and in such a case, no doubt, the remedy of the person whose property had been sold would, prior to confirmation, be by an application under section 311, or after confirmation by a suit governed by article 12 (*a*) of the Limitation Act. But there is nothing in the judgment to indicate that their Lordships had in contemplation the case of a party to the suit seeking after confirmation to set aside a sale on the ground of fraud, or to suggest that in the view of their Lordships he would be precluded from applying to the Court under the provisions of section 244 of the Code. It is, [148] moreover, to be borne in mind that the question whether the appellant in the present case is still entitled to apply under section 311 has yet to be decided.

There was another objection taken by the learned counsel to the effect that the proper parties were not before the Court, inasmuch as Messrs. Garth and Weatherall, who had, by assignment of the decree to them, become the decree-holders, were omitted, while Sorwar Jan, as

(1) (1899) I. L. R. 27 Cal. 242. (2) (1900) I. L. R. 25 Bom. 337.

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the purchaser of the properties from the auction-purchasers, was also a necessary party. It was also said that some of the co-sharers in the property, who ought to have been joined, had also been omitted. We think, however, that the objection is not one to which we can give effect, for, in the first place, the respondents appeared on the record, in the character both of decree-holders and auction-purchasers; nor is it suggested that the appellant was aware, at the time when he made his application, either of the assignment of the decree to Messrs. Garth and Weatherall, or of the sale to Sorwar Jan, and with respect to the so-called co-sharers, some of these persons have, we are informed in point of fact been made parties. But assuming, which may be doubtful, that a co-sharer cannot properly question an execution sale without bringing in all his co-sharers in the property sold, the appellant is the exclusive owner of the property affected by the present application, while the other persons interested in the properties sold have applied, as well as the applicant, to have the sale set aside, and their applications both in the Lower Court and here, have been treated virtually, as if they had been consolidated. The objection, moreover, so far as it appears, was not taken in the Court below, where any defect of parties, if such existed, might have been rectified.

Turning now to the main question. It was contended on behalf of the appellant that the Court below having found that certain of the properties sold had been allotted exclusively to the appellant under the partition, and that he had not been made a party to any of the proceedings in execution, it ought to have set aside the sale. The contention of the respondents, on the other hand, was that the effect of the decree in the mortgage suit to which the appellant was a party, was either to establish that there never had been a partition, or, if there had been, then that it was ineffectual as [149] against the respondents; that the decree relegated the parties to the position which they occupied when the mortgage was executed, and that the appellant, therefore, being a stranger to the mortgage, was not entitled to redeem or to assert any interest in the property sold, which was the property subject to the mortgage. This, however, we think is hardly a true representation of the effect of the decree, or of the relations of the parties. We have not the judgment of the Court in the mortgage suit before us, and we are unable, therefore, to say whether there was any reference in it to the partition. But looking to the plaint in the suit and the decree, we think that what was sought by the former was a declaration that the mortgagees were entitled, notwithstanding the partition, to have recourse to the undivided share of their mortgagor in all the properties which had been mortgaged to them. They did not seek, and, so far as the decree discloses, they did not obtain, a declaration that the partition was invalid, and if in point of fact the partition had taken place, it is not easy to perceive by what authority the Court could in that suit have made such a declaration, unless it had been established that the partition had been brought about in fraud of the mortgagees. But the fact of the partition was admitted in the plaint, and it was not suggested that it was in any way affected by fraud; all that was asserted with regard to it was that it was not within the power of the co-sharers to effect it—a proposition which was untenable. The fact of the partition being admitted, the only question between the appellant and the mortgagees, had the former defended the suit, would have been whether the mortgagees could resort to the properties

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which, on the partition, had been allotted to him. He might then most probably have successfully contended that they could not do so. But by failing to contest the suit, he did not lose the exclusive interest in those properties which resulted from the partition. The only consequence which followed was that a decree went against him declaring the right of the mortgagees to proceed against property which had become his to the extent of the interest therein originally belonging to their mortgagor, or, to put it otherwise, that on the partition he took the properties allotted exclusively to him, subject, to the extent of the interest previously belonging to the mortgagor, to [150] the mortgage. The effect of the partition was to extinguish as between the mortgagor and the appellant the interest of the former in the property allotted to the latter; so that the position of the appellant thereafter bore a close analogy to that of a purchaser of the equity of redemption in mortgaged property, who, by the purchase, becomes the owner of the property, but subject to the mortgage, and the decree did nothing to alter this state of things. It may be, as was contended by the learned Advocate-General, that the appellant has now no right of redemption; but assuming that to be so, it is merely a consequence of the decree having been made absolute, not a result flowing from the original decree, or decree *nisi*, in the suit. He might, as an owner of the property, have come in at any time and redeemed the mortgage, until his right of redemption was extinguished by the order absolute for sale. But the mere extinction of the right of redemption does not, we think, affect the question now before us, for a mortgagor whose property has been sold under a decree absolute on the mortgage, may come in and question the validity of the sale, although his right to redeem may have been long since extinguished by the decree, and, if he may do so, the person to whom he has transferred his interest may, we think, do the same.

The next question, therefore, appears to be whether, as the owner of the property sold, the appellant ought, under the circumstances of the present case, to have been made a party to the proceedings subsequent to the order absolute for sale, and if that question is to be answered in the affirmative, what is the effect of his not having been made a party? It was contended for the appellant, on the authority of *Ram Chandra Mukerjee* v. *Ranjit Singh* (1) that he was a necessary party, and that the effect of his not having been made a party was to invalidate the sale. The respondent's answer was that he was not a necessary party, it being sufficient that the mortgagors were before the Court, and that, even if he was a necessary party, the omission to join him did not affect the validity of the sale. In support of the latter position the learned Advocate-General relied upon *Malkarjun* v. *Narhari* (2), which he, moreover, contended, had in effect overruled *Ram Chandra Mukerjee* v. *Ranjit Singh* (1).

[151] In the latter case the plaintiff sued for a declaration of his title to and possession of certain immoveable property in the character either of *shebait* of an idol or as the rightful heir of one Kumar Ram Chand and his widow Rani Annadamoye. The property in question, it was said, had been dedicated to an idol by Kumar Ram Chand, but it was held in this Court that the dedication was fictitious. The plaintiff was, however, held to be the lawful heir of Kumar Ram Chand of Rani Annadamoye. The property had come after the death of Kumar Ram

(1) (1899) I. L. R. 27 Cal. 242. (2) (1903) I. L. R. 25 Bom. 337.

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Chand and of a lady, who had held it for her maintenance, into the possession of Rani Annadamoye as the widow of Kumar Ram Chand. After her death it was brought to sale in execution of a decree obtained against Rani Annadamoye, after the substitution for her in the execution proceedings of one Hari Singh, the son of Sri Narain Singh, the latter of whom claimed to be the adopted son of Kumar Ram Chand. The adoption, however, was invalid, and Hari Singh was not the heir, either of Rani Annadamoye or of her husband. The property was purchased at the sale in execution by the defendant. In these circumstances it was held that the sale could not affect the plaintiff's rights, and the Court accordingly gave him a decree for possession. In the course of their judgment the learned Judges say :—"It was urged for the respondent by way of cross-objection that the Court below was wrong in holding that the proceedings in execution were rightly taken. We think this contention of the respondent is valid. The property not being *debutter*, Sri Narain Singh not being the validly-adopted son of Kumar Ram Chand, and the plaintiff being by the Hindu law of the Benares school, which governs the parties, the heir of Kumar Ram Chand and of Rani Annadamoye, any proceedings in execution in the absence of the plaintiff and on the substitution of Sri Narain Singh or his son as the legal representatives of Rani Annadamoye must be ineffectual as affecting the plaintiff's right." It was on this passage that reliance was placed for the appellant, and the principle upon which it proceeds, if applicable to a case, where the question is as to the due representation of the estate of a deceased person, would certainly seem to apply equally to a case where the owner of the property sold has not been made a party to the proceedings in execution.

[152] In *Malkarjun* v. *Narhari* (1) the suit was for the redemption of mortgage and was instituted in the year 1887 by the heirs of the mortgagor. The defence was that in a suit instituted against the mortgagor by a creditor a decree was obtained, in execution of which the mortgagor's interest in the mortgaged property was brought to sale and purchased by the defendant (the mortgagee) 1880, who afterwards in the same year obtained possession and had ever since continued in possession. The plaint was silent about the execution sale, but in the written statement it was suggested that the plaintiffs might possibly contend that the sale was illegal, because it took place without the plaintiffs being joined in the certificate as heirs. It was, however, pleaded that the claim for redemption could not be maintained, unless a suit were brought to set aside the execution sale. Their Lordships gave effect to this plea, holding that, although the omission to serve notice of the proceeding in execution on the legal representative of the judgment-debtor was a serious irregularity, sufficient by itself to entitle the plaintiffs to vacate the sale and although the Court executing the decree had made a "sad mistake" as to the person, whom it treated as the representative of the judgment debtor, the sale nevertheless was not held without jurisdiction, and was therefore valid and binding upon the plaintiffs who, without having it set aside, could not redeem the property.

It may perhaps be difficult to reconcile this decision with the case of *Ram Chandra Mukerjee* v. *Ranjit Singh* (2). But, at all events it can aid the respondents only in so far as it shows that the sale now in question was not, in consequence of the omission to join the appellant in

(1) (1900) I. L. R. 25 Bom. 337. (2) (1899) I. L. R. 27 Cal. 942.

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the proceedings in execution, a nullity. The Subordinate Judge has no doubt treated the sale *qua* the appellant's interests in the property, as a nullity and, in doing so, we think, on the authority of *Malkarjun* v. *Narhari* (1) he was wrong. But that case did not, as need hardly be pointed out, decide that, because a sale is not a nullity, it cannot be set aside in a proceeding properly set on foot for that purpose. Here the appellant has applied in the manner prescribed by law to have the sale set aside, and his application was founded not only [153] on the provisions of section 311, but on those also of section 244 of the Code. Ordinarily, no doubt, the provisions of the former section can be availed of only when the sale has not been confirmed, and within the period of thirty days from the date of sale which, it is true, in the present instance, had expired long before the appellant's application was made. But if the right of the appellant to apply under the section was concealed from him by the fraud of the respondents, he would, by the operation of section 18 of the Limitation Act and notwithstanding the confirmation of the sale, have thirty days within which to make his application from the date on which the fraud first became known to him. In his petition to the lower Court he plainly enough sets up a case against the respondents of fraudulent concealment, and alleges that he had in consequence no knowledge either of the original suit or of the auction sale, until five days before the date on which he presented his application. If this had been made out, he would have been entitled to the benefit of the section, assuming of course the fulfilment of the conditions, which the section prescribes. At all events he would have been entitled to come in and question the sale on the ground of the irregularity complained of, and to which, *inter alia*, it may be added he attributes in his petition a very serious loss on the sale of the property. In consequence, however, of the manner in which the case has been dealt with in the Court below, none of these questions has been gone into, and the materials are not before us to enable us to express any opinion upon them. There are also, in addition to the irregularity, considered merely as such, in the conduct of the sale proceedings, the allegations of fraud contained in the petition upon which the appellant founded his case under section 244 of the Code, which likewise have not been dealt with by the Lower Court. These are independent of the other branch of the case and would, if established, have entitled the appellant to have the sale set aside. He has not, however, as would appear in consequence of the view taken by the lower Court which, though favourable to him, was erroneous, had an opportunity of placing his case before it, and we think that such an opportunity should now be afforded him. We accordingly set aside the order appealed against and remand the case to the Court below for retrial. The costs in this Court will abide the result.

[154] Since the above was written, we have been asked by the learned Advocate-General to consider the effect of *Nett Lall Sahoo* v. *Sheikh Kareem Bux* (2), which was not cited at the hearing, upon the position of the appellant. We have done so, but we do not think there is anything in the case, which should lead us to modify our judgment.

Appeal allowed. Case remanded.

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(1) (1906) I. L. R. 25 Bom. 337. (2) (1896) I. L. R. 23 Cal. 686.