

1868
July 7.

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Before Mr. Justice L. S. Jackson and Mr. Justice Mitter.

JUGAL KISHOR BANERJEE *v.* ABHAYA CHARAN SARMA.*

Decree and Sale under Act X. of 1859—Fraud—Purchase.

In a suit to annul the sale of an under-tenure in execution of a decree, under Act X. of 1859, which was subsequently set aside on the allegation that it had been obtained collusively and by fraud, it was found that neither the decree holder nor the purchaser was guilty of any fraud.

He'd., that the mere circumstance of the decree under which the sale had taken place having itself been set aside, did not invalidate the sale, the plaintiff having failed to show that the purchaser was a party to the fraud which led to the decree and sale.

THIS was a suit for confirmation of right and recovery of possession of 12 annas, 16 gs. share of a Howla, by setting aside an auction-sale held in execution of a decree alleged to have been obtained by means of fraud and collusion.

The facts out of which the present litigation arose, are as follows :

The defendant, Khaja Abdul Gunny, had originally instituted a suit, under Act X. of 1859, against the plaintiffs, Jugal Kishor and Ananda Chandra, and the defendant, Jagat Chandra, for recovery of arrears of rent of the disputed Howla. In that action, the defendant, Jagat Chandra, had raised no objection to the amount of the claim ; and a decree for Rs. 35 had been passed on the 8th July 1864, in the absence of the other two defendants, Jugal and Ananda, the plaintiffs in the present suit. In execution of that decree, the disputed Howla was put up to sale, and purchased by the defendant, Rup Chandra. Subsequently, the plaintiff, Jugal Kishor, on the 7th June 1865, petitioned the Collector, stating that he was not cognizant of the suit, nor of the auction sale ; and, accordingly, upon his application, the former decree was set aside, and a new decree passed for Rs. 29.

In this suit, the following were the main issues :

1. Whether a civil suit lies to set aside a sale held in execution of an alleged fraudulent decree made under section 105 of Act X. of 1859 ?

* Special Appeal, No. 3117 of 1867, from a decree of the Additional Principal Sudder Ameen of Dacca, reversing a decree of a Moonsiff of that district.

2. Whether the plaintiffs had a Howladari right to the land in dispute, and whether they held possession of the same?

The Moonsiff found that the first decree had been fraudulently and collusively obtained, and that it was subsequently set aside. The sale held in execution of that invalid decree was also based on fraud. Moreover, the Howla in question was purchased by the defendant, since deceased, who was a servant of the defendant, Khaja Abdul Gunny, the plaintiff in the Act X. suit. This shows that the whole proceedings were collusive, and were resorted to in order fraudulently to deprive the present plaintiffs of their just rights. He, therefore, held, on the authority of the Full Bench Ruling, in the case of *Nilmani Banik v. Padmalochan Chuckerbutty* (1), that a civil suit lies to set aside the auction sale held in execution of an invalid and fraudulent decree. It was also found that the plaintiffs were entitled under the Howladari right to the share in dispute, and that they had enjoyed uninterrupted possession of the same.

On appeal, the Principal Sudder Ameen reversed this judgment, and recorded his reasons in the following words: "The plaintiffs have given no satisfactory proof that the defendant, Rup Chandra or Abdul Gunny, has been guilty of any fraud, the former in purchasing the under-tenure, and the latter in obtaining a decree in the Revenue Court. The plaintiffs are not therefore, entitled to any relief."

Baboo *Ramesh Chandra Mitter* (with him Baboo *Hem Chandra Banerjee*) for appellants.—As the *ex parte* decree was set aside on a review of judgment, the sale of the tenure, which had taken place in execution thereof, became, necessarily, null and void. The rights of the appellant should at least have been declared by the appellate Court as unaffected by the said sale, which, under the circumstances, ought to have been set aside. The Principal Sudder Ameen was also wrong in not considering whether the proceedings in connection with the first decree were fraudulent and collusive, as found by the Court of first instance.

Baboo *Atul Chandra Mookerjee* for respondents.

(1) Case No. 1678 of 1865, 5th February 1866.

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The judgment of the Court was delivered by

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RAN SARMA.

JACKSON, J.—This was a suit for the purpose of setting aside the sale of an under-tenure belonging to the plaintiff, made under a decree which, it is alleged, had been obtained by fraud, and which was afterwards partially set aside on the application of one of the parties concerned upon a review of judgment.

The Moonsiff, before whom the trial first took place, found that fraud had been resorted to in obtaining the decree, and he insinuated, rather than expressly found, that the purchaser was mixed up with that fraud; and on that ground ordered the sale to be reversed. On appeal, the Principal Sudder Ameen recorded his opinion that the plaintiffs have given no satisfactory proof that the defendant, Rup Chandra or Khaja Abdul Gunny, has been guilty of any fraud, the former in purchasing the under-tenure, and the latter in obtaining a decree in the Revenue Court. He, therefore, reversed the judgment of the Court below, and ordered the suit to be dismissed.

The plaintiff comes up in special appeal, and urges, that the judgment of the lower appellate Court is defective, inasmuch as it sets aside, without any reason being assigned, the finding of the Court below on the question of fraud.

The decision of the Principal Sudder Ameen is certainly unsatisfactory, but we observe that, under more than one ruling of this Court, see the case of *Chandra Kant Sarma v. Bireswar Sarma Chuckerbutty* (2), and *Jan Ali v. Jan Ali Chowdry* (3), the circumstance that a decree under which a sale has taken place, has itself been set aside, will not invalidate the sale; and, consequently, the plaintiff would not be entitled to succeed in a suit like the present, unless he could show that the purchaser was himself a party to the fraud which led to the decree and sale, in which case, the Court will require him to re-convey the property to the plaintiff.

This has not been found, and is scarcely even alleged by the plaintiff in this case. Under these circumstances the plaintiff could not succeed, and the special appeal must be dismissed with costs.

(2) 7 W. R., 312.

(3) 1 *Ante*, p. 56.