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R. E. BELL v. GURUDAS ROY.

The decision of the Judge is reversed, and it is ordered and declared that Mr. Bell is not liable under the decree for the refund of the purchase-money or of the Government revenue, and consequently that his property was not liable to be attached or sold under it. The appellant will be entitled to the costs of this appeal and the costs of the appeal to the lower appellate Court in the matter of the execution.

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June 8.

Before Sir Barnes Peacock, Kt., Chief Justice, and Mr. Justice Mitter.

JAN ALI *v.* JAN ALI CHOWDRY.*

Execution Sale—ss. 58 *and* 105 *of Act X. of* 859*—Bonâ fide Purchaser.*

See also Page 71 & 84. 5 B. L. R. 69. 11 B. L. R. 8. 8 B. L. R. 8.

A. purchased a share of B.'s talook at an auction-sale, in execution of an *ex-parte* decree obtained against B., under section 105 of Act X. of 1859. B. obtained leave under section 58 of Act X of 1859 to revive the suit, and succeeded in getting it dismissed. He now sued to set aside the sale to A. *Held*, the sale to A. was binding against B., notwithstanding that the decree in execution of which it had taken place had been set aside in review, provided the sale was *bonâ fide*.

THIS was a suit for confirmation of title in respect of 12 kanis, 2 krants share of a certain talook, by reversal of an auction-sale, held in execution of a decree under section 105 of Act X. of 1859 and Act VIII. of 1865 (B. C. on the ground that it was fraudulent and collusive.

The circumstances of the case were as follows:

Bhairab Chandra, acting as tehsildar on behalf of Eusuf Khan, had obtained an *ex-parte* decree for arrears of rent, for Rs. 2-13, against the present plaintiff, Jan Ali Chowdry, in execution of which, the disputed talook was put up to sale, and purchased by the defendant, Jan Ali. Jan Ali Chowdry, against whom the decree was passed, then applied to the Deputy Collector, for a revival of the suit under section 58 of Act X. of 1859, as well as for reversal of the decree. The application was granted, and the suit, on being re-heard, was dismissed on the 5th April, as against Jan Ali Chowdry.

* Special Appeal, No. 3302 of 1867, from a decree of the Additional Judge of Chittagong, affirming a decree of the Moonsiff of that district.

The plaintiff instituted this suit to set it aside. He alleged, that he was kept in ignorance of the proceedings instituted against him under Act X.; that no arrear of rent was due from him at the time; that Bhairab Chandra had no authority in bringing the suit for rent; that the plaintiff had long standing enmity with the auction-purchaser; and that Bhairab, in collusion with the defendant, caused the tenure to be purchased at a very inadequate price.

The Moonsiff held, on the strength of the case of *Sarup Chandra Bhuttacharjee* v. *Kasiswari Dasi* (1), that a civil suit lies for setting aside the auction-sale. And on the merits he held, that the original *ex-parte* decree having been set aside, the sale which took place under it "must, as a matter of course, fall to the ground."

On appeal, the Judge upheld this decision. He found that the plaintiff had never had any knowledge of the *ex-parte* proceedings taken out against him until afrer the sale; although the assertion of the plaintiff that no arrear was due was not true; that it was conclusively shown that Bhairab had been in the constant habit of instituting suits on behalf of Eusuf Khan; that from a long time, the plaintiff and the auction-purchaser were at enmity with each other. On the question, whether a sale to a *bonâ fide* purchaser under an *ex-parte* decree subsequently set aside, is legally valid or not, the Judge remarked: "If Civil Courts cannot give redress in such a case, a person may find himself at any moment deprived of a valuable property, without any previous knowledge, for an insignificant debt. In the present case, however, taking into consideration the circumstances of the enmity existing between the purchaser and the plaintiff, the inadequate price realized, and the plaintiff being kept ignorant of the fact of the intended sale, there is a sufficient presumption of a fraudulent collusion between Bhairab and the auction-purchaser, which would afford good ground for cancelling the sale."

Baboo *Rajendra Nath Bose*, for appellant.—Jan Ali was a *bonâ fide* auction-purchaser; no fraud or collusion is proved to

(1) 6 W. R., Act X. Rulings, p. 55.

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have existed between the auction-purchaser and the decree-holder; and the facts found by the Judge do not constitute fraud on the part of the auction-purchaser The purchase was made in good faith, and for a valuable consideration. Under these circumstances, a civil suit will not lie to set aside the *bona fide* sale, although the *ex-parte* decree might have been subsequently set aside. *Ratnamani Dasi* v. *Kalikrishna Chuckerbutty* (1).

Mr. *Twidale* for respondent.—It is not denied by the pleader for the appellant, that a civil suit lies to set aside a sale on the ground of fraud. The only question to be determined is, whether the auction-purchaser, in making the purchase, was guilty of any fraud or not? And it is substantially found, as a fact, by the lower appellate Court, that the auction-sale was fraudulent, and made in collusion with the agent of the decree-holder.

Mr. *G. Gregory* (Baboo *R. N. Bose* with him), in reply.—No issue was framed by the Court of first instance on the question of fraud, which was the material contention of the parties. Unless fraud is directly and distinctly proved against the auction-purchaser, no suit will lie to set aside the sale, although the proceedings taken out against the judgment-debtor by the decree-holder might be fraudulent and malicious.

The judgment of the Court was delivered by

PEACOCK, C. J.—The decision of the Revenue Court has been set aside by the Revenue Court itself. It is contended, on the part of the plaintiff, that, as that decree has been set aside, there is no foundation for the sale to the auction-purchaser; and, consequently, that he, the plaintiff, against whom the decree was originally passed, is entitled to recover the lands sold under that decree.

It has been held (2) that a sale under a decree to a *bonâ fide* purchaser is valid, notwithstanding the decree may be reversed upon appeal, and it seems to follow that a *bonâ fide* sale, under

(1) Special Number, W. R., 147. (2) 7 W. R., 312.

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a decree which is afterwards set aside upon review, is equally binding. The authorities cited by Mr. Justice Norman fully bear out the opinion which he expressed in that case.

There were two kinds of execution in England, one a writ of *elegit*, under which property was delivered to the execution creditor, in order that he might satisfy his judgment by collecting the rents of the estate; and the other, writ of *fieri facias*, under which the sheriff was directed to levy the amount by seizure and sale of the defendant's goods and chattels. In the case of a sale under a writ of *fieri facias*, it was held by the Court of Common Pleas, and affirmed in error by the Court of King's Bench, after several arguments, that the sale to a *bonâ fide* purchaser, under a decree, was not affected by a subsequent reversal of the decree. But the delivery to the judgment-creditor under an *elegit*, is different, and it was held that the reversal of the judgment put an end to the plaintiff's title under the *elegit*. There is a good ground for the distinction, and as it is important to advert to the distinction, we think it right to refer to the reasons which were given by the Courts in each of the two cases.

One of these cases is *Mathew Manning's Case* (1). It was resolved in that case, that the sale by the sheriff by force of the *fieri facias* should stand, although the judgment was afterwards reversed, and that the plaintiff in the writ of error should be merely restored to the value, for the sheriff, who made the sale, had lawful authority to sell, and by the sale the vendee had an absolute property in the chattel purchased; and although the judgment, which was the warrant of the *fieri facias*, was afterwards reversed, yet the sale, which was a collateral act done by the sheriff by force of the *fieri facias*, should not be avoided; for the judgment was, that the plaintiff should recover his debt, and the *fieri facias* was to levy it of the defendant's goods and chattels, by force of which the sheriff sold the chattel as he well might, and the vendee paid money to the value of it.

It was remarked, that if the sale of the chattel should be avoided, the vendee would lose his chattel, and his money too;

(1) 4 Coke's Reports, Pt. 8, p. 94.

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and, therefore, great inconvenience would follow, that none would buy of the sheriff goods or chattels in such cases, and so execution of judgments (which is the life of the law in such case) would not be done.

The other case, to which reference is made by Mr. Justice Norman, is that of *Goodyere* v. *Ince* (1), the court then held that there was a difference "between the sale and delivery upon "an *elegit* to the party himself, and a sale to a stranger upon a "*fieri facias*; for the *fieri facias* gives authority to the sheriff "to sell and to bring the money into Court, wherefore when he "sells a term to a stranger, although the execution be reversed, "yet he shall not, by virtue thereof, be restored to the term, "put to the monies, because he comes-duly thereto by act in "law. But the sale and delivery of the lease to the party him-"self upon an *elegit*, is no sale by force of the writ, which being "reversed, the party shall be restored to the term itself."

We think that the distinction is founded upon reason and good sense, and that our decision must be in accordance with these authorities.

It is, therefore, necessary to decide, whether the purchaser, under the execution, was a *bonâ fide* purchaser; or whether, as alleged in the plaint, he was in collusion with they ijaradar, the plaintiff in the revenue suit.

The Court of first instance considered, that as the decree had been set aside, the plaintiff was entitled to succeed in this suit, whether there was fraud between the ijaradar and the purchaser under the decree or not; and he did not raise or try any issue as to whether there was any collusion or fraud. The Judge did try that question, but he tried it upon the evidence as it stood in the lowet Court, and neither of the parties, therefore, had an opportunity of calling witnesses upon that issue.

The main points, upon which the Judge has found that there was fraud between the ijaradar and the auction-purchaser, are, *first*, that enmity existed between the purchaser and the plaintiff; *seeondly*, that Bhairab Chandra, the naib of the ijaradar, was present at the sale; *thirdly*, the inadequacy of the price realized;

(1) 3 Croke's Rep., 216.

and *fourthly*, the ignorance in which the plaintiff was kept of the intended sale. I by no means intend to say that the Judge arrived at an erroneous conclusion of fact, but I think there was not in strictness any legal evidence to warrant it. The case ought to be remanded, in order that the question of fraud and collusion between the auction-purchaser and the plaintiff in the decree may be tried. The case should go to the Judge, in order that he may send it to the Moonsiff under section 354 of Act VIII. of 1859, to try whether such fraud or collusion existed, to return his finding, together with the evidence, to the Judge, for final decision. Either party should be at liberty to adduce any evidence he many think fit upon the trial of that issue, and we think that the Moonsiff ought to be directed to summon all the parties to this suit, that is to say, the ijaradar, his naib, and the auction-purchaser; and, as it is suggested that there was collusion between the plaintiff and the ijaradar, we think the plaintiff should also be summoned and examined.

It does not appear what was done with the purchase-money paid by the auction-puchaser, whether any, and if any, what portion of it was paid out to the plaintiff in the rent suit, or to the defendant in that suit, and whether the auction-purchaser has ever obtained possession of what he purchased, or taken any and what steps for that purpose; or whether the plaintiff in this suit, or the ijaradar, or the auction-purchaser, has been in possession since the auction-purchase. We think those points must be inquired into by the Moonsiff when the case goes back to him on remand from the Judge, as they have a material bearing upon the question of fraud.

The costs of this appeal will abide the result of the ultimate decision in the case.