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

1869
March 13.

SRIMATI DEBI (ONE OF THE DEFENDANTS.) v. MADAN MOHAN SING (PLAINTIFF).*

Onus Probandi—Bonâ fide Sale.

In execution of a decree, the Judgment-debtor's right, title, and interest in a certain property was attached. The plaintiff thereupon preferred a claim under conveyances from the judgment-debtor, but it was rejected, and the property was sold. The judgment-creditor purchased the same at the auction, and sold it to the defendant, who ousted the plaintiff, who thereupon sued to recover possession under his conveyances.

Held, that the onus was not entirely upon the plaintiff to prove *bona fides* of the sale, but that the evidence adduced by the defendant should be examined also.

Ishan Chandra Das v. Rukimudin Sowddagar (1) distinguished.

THIS was a suit for recovery of possession of 11 bigas and 9 katas of land upon the allegation that the plaintiff had purchased, but that it represented a real and honest transaction between the parties. The Judge says that the kabala has been attested and proved by the attesting witnesses. We do not think that the lower Court disputed that fact, but what the lower Court did dispute was that, although the deed was executed, there was no consideration for it so as to make it binding on a creditor.

Then again the Judge says that, in a talooki potta granted to the plaintiff by the zemindar, mention is made of the above kabala, thereby treating the fact that the zemindar believed the potta to be genuine, without having any evidence before him, as a guide to himself, the Judge, respecting the mode in which he should determine the case, upon the evidence adduced. We cannot say that the Judge would have upheld this kabala, but for the erroneous opinion which he appears to have entertained as to the law.

It may be as well to remark that, with respect to the *Binama*, *viz.*, the purchase under the execution, the Judge says, in

* Special Appeal, No. 2231 of 1868, from a decree of the Officiating Judge of Midnapore, dated the 27th May 1868, reversing a decree of the Principal Sudder Ameen of that district, dated the 6th February 1868.

(1) *Before Sir Barnes Peacock, Kt., Chief Justice, and Mr. Justice Mitter.*

MUNSHI ISHAN CHANDRA DAS AND ANOTHER (DEFENDANTS) *v.* RUKIMUDDIN SOWDAGAR (PLAINTIFF.) †

The judgment of the Court was delivered by

PEACOCK, C. J.—We think it clear that the Judge, in his judgment, has laid down several erroneous principles of law. In the first place he says that the onus was on the defendant to prove the alleged *malâ fides* of the transaction in question, and he has failed to prove it. The suit was brought to set aside an order of the Small Cause Court, in which that Court had held that the deed was *malâ fide*. The onus, therefore, lay on the plaintiff to prove not only that the deed was executed,

† Special Appeal, No. 1362 of 1868, from a decree of the Judge of Chittagong, dated the 28th February 1868, reversing a decree of the Sudder Ameen of that district, dated the 14th March 1867.

chased the same from Rajnarayan Roy under two coveyances, and was in possession thereof. That Gopinath Roy, who held a decree against Rajnarayan, caused the property, 8 bigas and 9 katas of the said land, to be attached and put up to sale in execution of his decree. That the plaintiff's claim to the same was rejected, and the property in dispute was sold. That Gopinath purchased the property at auction-sale, and sold it to the defendant Srimati, who ousted the plaintiff from the whole 11 bigas and 9 katas.

The defendant, Srimati Debi, stated in her written statement that she had purchased the property from the purchaser at the auction, and has since been in possession thereof.

The Principal Sudder Ameen found that the judgment-debtor had all along been in possession of the property in dispute, and that the sale to the plaintiff was collusive and benami for the benefit of the judgment-debtor. He, accordingly, dismissed the suit.

effect, that such a sale could have taken place without any fraud having been committed or intended, and then he adds :— "The onus was upon the defendant to prove the alleged fraud, and that he has utterly failed to do." We have already pointed out that the onus was on the defendant. The decision of the Judge must be reversed, and the case remanded to be re-tried *de novo* upon regular appeal. The costs to abide the event. Having remanded the case, we think it right to call it up, and hear it ourselves upon regular appeal, as we have done in other similar cases.

The case having been transferred and called up for argument and heard on regular appeal, the Court said:—

It appears to us that the decision of the Judge, reversing the decision of the Sudder Ameen upon the question of fraud, was most unsatisfactory. The kabala was executed upon the very day on which the defendant obtained his decree, and the decree, under which the plaintiff purchased a part of the the property, was an old standing decree obtained by default, and which the parties never attemped to execute, until it became necessary to defeat the defendants. We think the parties and the witnesses must have laughed in their sleeves and chuckled at the manner in which they had hoodwinked the Judge, when they induced him to believe that the transaction was an honest one, and to reverse the decision of the native Judge, who had seen into the fraud. I never saw a case myself in which fraud was more patent than it is in the present. Having called up the case upon regular appeal from the decision of the Sudder Ameen, we uphold his decision, and the plaintiff will pay the costs of the special appeal and the costs in the lower Appellate Court.

If in cases in which there is an apparent attempt to defeat a decree by a bill of sale of the debtor's property, Judges would examine minutely as to the mode in which the purchase-money for the bill of sale was paid, and how it was dealt with, they would be more likely to detect the fraud, which, in cases of this sort, are frequently attempted to be palmed upon them.

1869

SRIMATI DEBI v. MADAN MOHAN SING.

On appeal, the Judge held that, as the plaintiff's deeds of sale had been registered before the decree, the plaintiff's purchase was proved. That it was for the defendant to shew that the sale was a benami transaction, but she had failed to do so; that the plaintiff had proved his possession, and that the transaction was *bonâ fide*. He, accordingly, passed a decree in favor of the plaintiff.

The defendant appealed to the High Court, on the following grounds:—That there was no decision as to the passing of the consideration; that the onus was wrongly thrown on the defendant; and that the finding of the fact of plaintiff's possession was based upon no evidence.

Mr. *Twidale* and Baboo *Tara Prasanna Mookerjee* for the appellant.

Baboo *Ashutosh Dhur* and Baboo *Bhawani Charan Dutt* for the respondent.

JACKSON, J.—I think the special appeal in this case fails. It is contended that that this was a case in which the burden of proof lay entirely upon the plaintiff, and it was superfluous to look at the evidence for the defendant, until the plaintiff had made out a complete case, the fact being that the plaintiff sued to establish his right to certain lands, after the claim advanced by him in execution of the decree of a third party had been rejected.

The plaintiff proved his purchase from the judgment-debtor, previous to the attachment of the land and showed that he had got possession under that purchase. The defendant impugned this sale, declaring it to be fraudulent.

It is said, on the side of the special appellant, that this being suit to get rid of an order passed in execution of a decree, it lay upon the plaintiff to show that the sale was *bonâ fide*, and we are referred to *Ishan Chandra Das* v. *Rukimuddin Sowdagar* (1), in which the learned Chief Justice laid down that it was not for the defendant to prove *mala fides* in such a case, but the plaintiff wholly to prove the *bona fides* of the deed on which he relied.

(1) *Ante*, 326.

1869

SRIMATI DEBI v. MADAN MOHA SING.

That case was quite distinguishable from the present one. That was a case in which the Court of Small Causes had decided against the deed, and the suit was for the express purpose of getting rid of that decision, and of setting up the deed in question. Here the plaintiff only undertook to establish his right. The point on which his claim had been rejected in execution of the decree was that of possession. This possession he has proved affirmatively. Both parties adduced evidence in support of their respective contentions as to the *bona fides* or otherwise of the deed. The Judge was quite right in looking at the evidence on both sides; and in holding that the deed was valid and *bonâ fide*, no case of the contrary character being made out, The judgment of the Court below must be affirmed with costs.

MARKBY, J.—I am entirely of the same opinion. I really don't understand what it is that is said to be wrong in the way in which the Judge has dealt with the case. The plaintiff and defendant both gave evidence, and the Judge examines, tests, and contrasts the evidence given by either party, and then comes to a result in favor of the plaintiff. If this is not, what is the duty of a Judge to do in every case ? I don't know what is. I think it was the bounden duty of the Judge to consider the evidence on both sides as a whole, and that the mode of dealing with the case suggested by the appellant, by which the Judge is to break up the eveidence into parts, and consider separately what inference is to be drawn from each, guided by some supposed rules of presumption, and that he is to march thus from presumption to presumption, until he arrives at a final presumption in favor of one side or the other, is a sort of proceeding which the law never recognised, and would infallibly lead to the most unfortunate results.