

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

SIVA PERSHAD MAITY AND OTHERS (DEFENDANTS) v. NUNDO
LALL KAR MAHAPATRA (PLAINTIFF).*

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July 10.

Sale in execution of decree—Suit to set aside sale on ground of fraud—Sale in execution of mortgage decree directing the sale of the mortgaged property under ss. 88 and 89 of Transfer of Property Act—Decree nisi not absolute—Right of suit—Civil Procedure Code, ss. 244, 311, and 312.

Where a suit to set aside a sale in execution of a decree was brought on the ground that by the fraud of the judgment-creditor the proclamation of sale had not been duly made, and the facts were that the sale was not an ordinary sale of attached property in execution of a decree, but a sale in execution of a mortgage decree which directed the sale of the mortgaged property in accordance with the provisions of sections 88 and 89 of the Transfer of Property Act, but that there was no such decree in existence, as only a decree *nisi* and not a decree absolute directing the sale had been made; and it was contended that until a decree absolute was made for the sale, the right to redeem existed, and that the suit might be regarded as a suit to redeem; *Held*, that there was nothing in these facts to distinguish the case from the Full Bench case of *Mohendro Narain Chaturaj v. Gopal Mondul* (1), and that the suit was therefore not maintainable. An order directing a sale in such a case would be sufficient authority under section 89 of the Transfer of Property Act even if the order did not take the form of a decree such as is prescribed for a decree absolute in the case of a suit for foreclosure.

THIS was a suit to set aside a sale in execution of a decree obtained by the defendants against the plaintiff for a sum of Rs. 9,526-5 on the 19th November 1886. The decree was for money due on a mortgage bond, and it directed that if the amount decreed was paid within the month of February, the mortgaged property should be released, otherwise that on the expiry of the prescribed period, the decretal amount should be realized by the sale of the mortgaged property. As the money was not paid, the property was sold on the 18th May 1887, and purchased by the decree-holders (the defendants) for the sum of Rs. 6,800.

* Appeal from Original Decree No. 61 of 1889, against the decree of Baboo Dwarka Nath Bhuttacharjya, Subordinate Judge of Midnapore, dated 10th of December 1888.

1890 On the 15th June 1887 the plaintiff applied to have the sale set aside on the ground that the sale proclamation had not been duly published. This application was rejected on the 17th December 1887, as he adduced no evidence and the decree-holders opposed it; and the sale was confirmed. On the 13th January 1888 the defendants, the auction-purchasers, obtained possession of the property purchased by them.

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The plaint was filed on the 21st May 1888. It alleged that the sale was invalid because no proclamation by beat of drum had been made; that the omission to so proclaim it was the result of fraud; and that there had been collusive biddings. The plaint prayed that the sale should be set aside, as being tainted with irregularity, illegality and fraud; and that possession of the mortgaged property should be given to the plaintiff. There was also in the alternative a claim for damages.

The defendants in their written statement contended that there was no cause of action; that the plaintiff's objections under section 311 of the Code of Civil Procedure having been overruled, no regular suit founded on the same objections would lie; that the sale proceedings were regular, and that there was no fraud on their part.

On the contentions of the parties issues were fixed, of which the following only are material to this report:—

“Whether the plaintiff having formerly taken objections under section 311, this regular suit would lie?”

“Whether any fraud was committed by the defendants in the proceedings connected with the auction-sale?”

The Subordinate Judge overruling the first objection of the defendants held that the suit would lie, and also found that the fraud alleged by the plaintiff was established. He also held, on an objection taken at the hearing, though not raised in the defendants' written statement, that the suit was not barred by section 244 of the Civil Procedure Code. He therefore gave the plaintiff a decree.

From this decision the defendants appealed.

Mr. Evans, Dr. Rash Behari Ghose, and Baboo Jogesh Chunder Dey for the appellants.

Mr. Woodroffe, Baboo Mohini Mohun Roy, and Baboo Jagat Chynder Banerjee for the respondent.

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The judgment of the Court (MACPHERSON and BANERJEE, JJ.) was delivered by

MACPHERSON, J. (who after stating the facts as above, continued):—A further point, though not raised in the written statement of the defendants, was raised in argument before the Subordinate Judge, namely, that the plaintiff's objections to the validity of the sale ought to have been preferred and dealt with under section 244 of the Code of Civil Procedure by the Court executing the decree, and that no separate suit to set aside the sale would lie. This contention the Subordinate Judge overruled.

The same objection has now been taken before us, and the decision of a Full Bench of this Court in *Mohendro Narain Chaturaj v. Gopal Mondul* (1) is relied on. The facts of that case are similar to those of the present case: indeed they are more favourable to the plaintiff than they are here, because no application to set aside the sale had been made or dealt with prior to the regular suit which was instituted for the purpose of setting it aside. The question referred to the Full Bench was:—"Whether, when circumstances affecting the validity of a sale have been brought about by fraud of one of the parties to a suit, and give rise to a question between those parties such as, apart from fraud, would be within the provisions of section 244, a suit will lie on the ground of fraud notwithstanding the provisions of that section?" The Full Bench decided that no such suit would lie.

It has been attempted to distinguish the present case from the case which was before the Full Bench in this way. It is said that the sale in the present case was not an ordinary sale of attached property in execution of a decree; that it purports to be a sale in execution of a mortgage decree which directs the sale of the mortgaged property in accordance with the provisions of sections 88 and 89 of the Transfer of Property Act; but that there is no such decree in existence, as only a decree *nisi* had been made, and not a decree absolute directing the sale. It was further argued that

(1) I. L. R., 17 Calc., 769.

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The answer to the above contentions is that no such objection was taken till the present moment; and it is now too late to take it. We are not in a position to say that the decree or order absolute for sale of the mortgaged property was not made. We cannot suppose that the sale was held without an order directing it; and if there was an order that would, we think, be sufficient authority under section 89 of the Transfer of Property Act, even if the order did not take the form of a decree such as is prescribed for a decree absolute in the case of a suit for foreclosure, the contention that this suit may be regarded as a suit to redeem is obviously untenable. Even if there is no order absolute, the decree *nisi* directing the sale is in existence; and if the right to redeem be still alive, it cannot be enforced by a separate suit. We are unable to distinguish the present case from the case which was before the Full Bench, the decision in which we are bound to follow; and we must hold that the suit is not maintainable, and that the plaintiff's proper course was to have the matter brought before the Court and disposed of under section 244 of the Code of Civil Procedure.

It has been strongly pressed upon us that we should treat this suit and the decree which has been made in it as an application and an order under section 244, on the ground that no question of jurisdiction arises; that the case has been tried by the Court which would have disposed of the objections under section 244; and that the only question is one of costs, as to which the plaintiff is ready to submit to any terms which the Court may impose.

We do not see our way to take this course, as we think that the matter has already been disposed of by the Court executing the decree. The plaintiff objected before that Court to the validity of the sale, on the ground that the sale proclamation had not been duly published. The objection was disallowed and the sale was confirmed. As the judgment-debtor was the person whose property had been sold, and the auction-purchaser was the decree-holder, both were parties to the suit, and the question raised was one relating to the execution of the decree which the Court

executing the decree must dispose of under section 244. The petition of objection does not show that it was made specifically under section 311, and the decision of the Judge dealing with it does not show that it was disposed of under that section. But it matters not if it was, and it may be conceded that the parties treated it as an application under section 311. It matters not, because the question raised was one of those provided for by section 244, and one which would be properly disposed of under that section. If the additional ground which has now been raised, namely, that there was irregularity in connection with the bidding at the auction-sale, was not raised in the objections which the plaintiff previously took to the sale, the answer is that it ought to have been raised. It is not even alleged in the present case that the fraud now charged was not known to the plaintiff at the time when he applied to have the sale set aside. Under any circumstances all the irregularities which he now urges ought to have been urged when he objected to the sale. We cannot see, therefore, that there is any hardship or any injustice to the plaintiff in our refusing to deal with the matter in the way suggested by him. He had his opportunity and he failed to take advantage of it. We are, for the reasons which have been given, precluded from so dealing with it.

As to the prayer for damages, it is enough to say that this was never pressed in any way, and that the suit has been treated throughout as one in which the sale ought to be set aside on the grounds set out in the plaint.

The result is that the preliminary objection that the suit is not maintainable must prevail; the appeal must be decreed with costs; the decree of the Subordinate Judge set aside, and the suit dismissed.

Appeal allowed.

J. V. W.

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