

such relief, but that the Court may in its discretion grant mesne profits in respect of the period following the date of suit or not. It was accordingly held that the not granting of that which the Court was not bound to grant, and which the Court might or might not have granted, should not necessarily raise the inference that it was refused. That case, therefore, has no application to the present.

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It was further argued that Explanation III is meant only to bar so much of the claim as is expressly dealt with in the judgment but is not referred to expressly in the decree. We find neither reason nor authority for such a contention. If any matter is expressly dealt with in the judgment, the principle of *res judicata* would apply to it, notwithstanding that the decree does not refer to it expressly, by reason of the express words in the enacting part of section 13 which says: "No Court shall try any issue which has been heard and determined in a former suit;" and if the object of Explanation III was merely to prohibit the trial in a second suit of an issue already tried and determined in a former suit, notwithstanding the absence of any allusion in the decree to the matter so dealt with, Explanation III might as well have not been given.

For all these reasons we think that the decision arrived at by the Lower Appellate Court is correct and that this appeal must be dismissed with costs.

*Appeal dismissed.*

C. S.

*Before Mr. Justice Prinsep and Mr. Justice Banerjee.*

ABDUL LOTIF (PLAINTIFF) v. YOUSUFF ALI AND OTHERS  
 (DEFENDANTS).\*

1893  
 August 8.

*Right of suit—Decree setting aside sale, effect of not executing, within six months—Sale, validity of—Right of auction-purchaser to bring suit for declaration of title and possession—Revenue Sale Law (Act XI of 1859), s. 34.*

Certain property having been sold for arrears of Government revenue the defaulting tenant brought a suit in the Civil Court to have the sale set

\* Appeal from Appellant Decree No. 3 of 1893, against the decree of C. P. Caspersz, Esq., District Judge of Chittagong, dated the 17th of September 1892, reversing the decree of Babu Shosi Bhusan Chowdhry, Munsif of that district, dated the 29th of February 1892.

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aside, and obtained a decree which he did not attempt to execute till after the expiry of six months from its date. *Held*, in a suit brought by the auction purchaser to recover possession of the share he had bought at the sale, that such non-execution of the decree had the effect of restoring the sale so far as it concerned the defaulter, and that the plaintiff was entitled to succeed.

THE facts of this case were shortly as follows :—

On the 12th of September 1879 the plaintiff purchased a one-third share of an estate held by five of the defendants which was sold by public auction for arrears of Government revenue. After his purchase he sold a six-annas share of his share to Mohamed Ali, the sixth defendant. Sarat Chandra, one of the defaulting co-sharers, brought a suit in the Civil Court to have the sale for arrears of Government revenue set aside, and the sale was set aside. Having obtained his decree, Sarat Chandra failed to execute the decree within the six months allowed by the Revenue Sale Law (Act XI of 1859, s. 34), and on his applying to execute his decree the Civil Court held that he had abandoned his right to execute the decree obtained by him, as the application had not been made within the six months allowed by the Revenue Sale Law. On appeal the High Court upheld that decision. The plaintiff then instituted six suits to establish his proprietary right to the lands, as being part of his share of the estate, claiming to be entitled to hold them jointly with the defendants. All the cases were, by the request of the parties, tried together. The Munsif gave the plaintiff a decree in all the suits, holding that as the decree had not been executed within the six months allowed by law, that the sale stood good. On appeal the District Judge held that inasmuch as the sale was set aside, the plaintiff had no right to sue, and reversed the Munsif's finding.

From this decision the plaintiff appealed to the High Court.

Babu *Akhil Chunder Sen* for the appellant.

Mr. *M. L. Sandel* for the respondents.

The judgment of the Court (PRINSEP and BANERJEE, JJ.) was as follows :—

The defendants, respondents in this case, are co-sharers in an estate, holding shares recorded separately, who defaulted in

payment of Government revenue, and their shares were sold up. The plaintiff, appellant before us, purchased under the Revenue Sale Law of 1859. A suit was brought to set aside that sale by one only of the defaulters, and he obtained a decree; but he brought himself within the operation of section 34 of the Revenue Sale Law of 1859, inasmuch as he failed to execute his decree within six months from the date thereof. He attempted to execute that decree in respect of costs, and execution was refused by reason of section 34. The plaintiff, who was the purchaser, now sues to recover possession of the recorded share that he bought, and he obtained a decree in the Court of the Munsif. In appeal the District Judge has considered only one point, namely, the effect of the decree setting aside the sale, and whether the plaintiff, the sale having been set aside by that decree, had any right as purchaser to sue for possession. The District Judge has held that inasmuch as the sale was set aside, the plaintiff has no right to sue.

An objection was raised before him that the decree was not evidence in the present case, but it was disallowed, on the ground that it is admissible under section 42 of the Evidence Act, since it relates to a matter of a public nature; and the Judge has found that it was of a public nature by reason of the publicity of the proceedings in the Collector's Court. We think that the Judge has misapprehended the meaning of section 42 of the Evidence Act. A suit to set aside a sale for arrears of revenue concerns only the parties to that suit, and is no more of a public nature than any other suit, and the publicity of the sale cannot affect the nature of the suit or the decree passed. It cannot affect the public which of the parties was successful in that suit. The illustration to section 42 shows the class of decrees that the Legislature had in contemplation.

The Judge has failed to appreciate the position of the parties in this case. Section 34 declares that if a sale made under the Revenue Sale Law of 1859 be annulled by a final decree of the Civil Court, the application for execution of such decree shall be made within six months after the date thereof, otherwise the party in whose favour such decree was passed shall lose all benefit therefrom. Now, although under this law defaulters have lost all

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benefit from this decree, the effect of the Judge's order declaring that the purchaser has no right, title or interest must be to give the property to the defaulters; in other words, to give them the benefit of the decree by holding that the sale to the plaintiff has been set aside. The only parties affected by that decree were the defaulters and the auction-purchaser; and if the defaulter is to get no benefit from the result of the suit brought by him and the decree which he obtained, it follows that the purchaser must be restored to his previous position. It seems to us, therefore, that the effect of section 34 of the Revenue Sale Law, by reason of the neglect on the part of the defaulter to take advantage of the decree obtained by him annulling the sale, is to restore that sale so far as concerns the defaulter or those whose rights were sold at that revenue sale, and who have not thought it proper to join in the suit to have the sale set aside.

It is pointed out to us that, after hearing the argument on the other points raised in the appeal before him, the District Judge thought it necessary only to refer to this one point; and that, therefore, it should be assumed that he has found against the respondents on all other points. We cannot accept this view of the case. It seems to us clear that, although the District Judge may have heard the other points argued, he decided only this one point. It is impossible to say what his opinion on the other objections raised were. If it had been expressed, the parties might have had just ground to dispute them on second appeal.

The appeal must therefore be returned to the District Judge for trial of the other points raised before him.

The costs of this appeal will abide the result.

The judgment will also govern the other cases, namely, appeals from Appellate Decrees Nos. 56 to 60 of 1893.

*Appeal allowed and case remanded.*