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(1965) 10 AHC CK 0018

Allahabad High Court

Case No: Second Appeal No. 894 of 1964

Bhojai		APPELLANT
	Vs	
Salim Ullah and Others		RESPONDENT

Date of Decision: Oct. 22, 1965

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 90, Order 21 Rule 90(1), Order 21 Rule 92, Order 21 Rule 92(3), Order 34 Rule 5

Citation: AIR 1967 All 221

Hon'ble Judges: Gangeshwar Prasad, J

Bench: Single Bench

Advocate: K.C. Saksena, for the Appellant; Mohd. Hamid Husain, for the Respondent

Final Decision: Dismissed

Judgement

Gangeshwar Prasad, J.
This is an appeal by a defendant, and it arises out of a suit for selling aside a final decree passed under Order XXXIV, Rule 5. C P C and the execution proceedings based thereon which terminated in the auction sale of a house belonging to the plaintiff, on the ground of fraud.

2. The house was purchased by Hayat Ullah plaintiff on 10-11-1937. Adjoining this house is a house owned by Sakhawat Ali and Hashmat Ali defendants Nos. 2 and 3 who are brothers. These houses are situate within the municipal limits of Allahabad. Formerly, both these houses were designated by one single municipal number, i.e.. No. 136, but later the house in dispute was described as No. 136-A and the house owned by defendants Nos. 2 and 3 as No. 136 in the municipal records. Defendant No. 1, the Municipal Board of Allahabad, brought suit No. 174 of 1943 at Allahabad for the recovery of Rs. 16-12-0 as arrears of house and water taxes in respect of the houses against the plaintiff and defendants Nos. 2 and 3 and a preliminary decree for sale under Order XXXIV, Rule 4 of the C. P. C. was passed in that suit on

11-4-1944. At the time of the suit the houses were not only described as No. 136 but were entered in the names of defendants Nos. 2 and 3 alone in the municipal records. These facts are not in dispute.

3. The case of the plaintiff is that ever since the house in dispute was purchased by him, defendants Nos. 2 and 8 were keen on ousting him and taking possession of the house somehow or other. With that object in view they filed certain cases against the plaintiff with regard to the house, but lost them. Thereafter, they prevailed upon the servants of defendant No. 1, the Municipal Board of Allahabad, to file suit No. 174 of 1943 impleading the plaintiff also as one of the defendants. The scheme in pursuance of which this was done was that the plaintiff should remain ignorant of the suit and the execution proceedings, and in execution of the decree passed in the suit the house belonging to him should be secretly sold at auction and purchased by defendants Nos. 2 and 3 at a nominal price. The plaintiff was living at Calcutta with his family for several years past, but he came to learn of the suit and thereupon filed a defence and contested the suit At the stage of the preliminary decree, therefore, defendants Nos. 2 and 3 did not succeed in their design.

Subsequently, however, when proceedings for the preparation of final decree and for sale in execution thereof were taken, defendants Nos. 2 and 3 in collusion with the Pairokar of defendant No. 1 managed to keep the plaintiff entirely in dark about the proceedings In-getting false and fraudulent service of notices effected against the plaintiff at Allahabad, although the plaintiff was throughout at Calcutta It is alleged that No. sale proclamation was ever made and everything pertaining to the sale was done with utmost secrecy so that attention of people might not be attracted. The house belonging to the plaintiff was ultimately shown as having been auctioned for a sum of Rs. 70 in favour of Bhojai defendant No. 4, who according to the plaintiff was a Benamidar for defendant No. 2. It is said that the house had been rebuilt by the plaintiff after the purchase and its value at the time of the alleged auction sale was about Rs. 5,000. The main defence to the suit is that the final decree and the sale proceedings are not vitiated by fraud and are not liable to be set aside, and it is this defence alone that is relevant for the purpose of the appeal.

4. The trial Court held that No. fraud was proved and dismissed the suit. On appeal by the plaintiff, the learned Civil Judge disagreed with the conclusion of the trial Court and found that the final decree was obtained by fraud in the manner alleged by the plaintiff and was the result of a collusion between the defendants. The judgment of the trial Court was, accordingly, reversed by the learned Judge, and the suit of the plaintiff was decreed Bhojai defendant No. 4 who claims to be the auction purchaser of the house in dispute has prefer red this appeal.

5. The points raised by Mr. K. C. Saksena learned counsel for the appellant, are as follows:

1. It has not been established from the facts and circumstances of the case that the final decree in question was obtained by fraud.

2. The final decree cannot be said to have been obtained by fraud merely on the ground that notice of the proceedings for the preparation of the decree was not properly served on the plaintiff.

3. No. provision of the C. P C. requires notice of the application for the preparation of final decree to be issued, and No. fraud in relation to the service of such notice can. therefore, vitiate the decree.

4. The appellant is a bona fide purchase; for value, and his rights under the auction sale cannot be affected by a fraud to which he himself was not a party.

5. The auction sale has become absolute and the suit of the plaintiff is barred by Order XXI, Rule 92 (3) of the C. P C. I shall deal with these points in the order in which they have been set forth.

6. As I have already said, the learned Civil Judge has found that the impugned final decree was obtained by means of fraud and was the outcome of a collusion between the defendants. This is a finding of fact, and as such it is binding in second appeal. Mr. Saksena has not suggested that there was any legal error in the approach of the learned Judge to this question of fact, and all that he has urged in support of his first point is that the facts and circumstances of the case do not justify an inference of fraud. It must, however, be borne in mind that the question whether or not an inference of fact should be drawn from certain evidentiary facts is itself a question of fact, and a finding of fact does not cease to be so merely because it is in the nature of an inference This is No. longer open to question in view of the pronouncement of the Supreme Court in Meenakshi Mills, Madurai Vs. The Commissioner of Income Tax, Madras, . where one of the principles laid down at page 65 is that ''when the finding is one of fact, the fact that it is itself an inference from other basic facts will not alter its character as one of fact''

As authorities dealing specifically with findings on fraud I may refer to Kashi Kurmi Vs. Bansraj Kurmi . In the former case, where the District Judge had found that there was No. fraud or collusion but the High Court had reversed the finding in second appeal, the Privy Council observed that the High Court was not entitled to go behind the findings of fact of the District Judge which did not result from the misconstruction of a document or the misapplication of law or procedure, but upon the oral evidence in the case. In the latter case where the first appellate Court had found that fraud had been practised by the defendants, it was held by a learned Judge of this Court in second appeal that whether there was any fraud or not was a question of fact which had been found by the lower Court on the evidence produced by the parties and the finding of the lower Court was conclusive I may also mention in this connection Jagrup v. Ram Sabad AIR 1942 Oudh 217. though in that case it was pot decided but conceded that a finding of fraud being one of fact could not be

contested in second appeal.

7. Although the finding recorded by the learned Civil Judge on the question of fraud is not open to challenge. I have gone through the evidence and I am satisfied that the finding is justified and correct It appears that after the purchase of the house in dispute by the plaintiff, proceedings u/s 145, Cr.P.C. were started by defendants Nos. 2 and 3 in respect of the house These proceedings ended in favour of the plaintiff. Thereafter, defendants Nos. 2 and 3 filed a civil suit against the plaintiff for possession of the house. The case was fought upto the High Court but defendants Nos. 2 and 3 lost it in all the Courts. Suit No. 174 of 1943 in which the impugned final decree was passed was then instituted by defendant No. 1, the Municipal Board of Allahabad, for the recovery of house and water taxes from the plaintiff and defendants Nos. 2 and 3. It is significant that at the time of the institution of the suit, the house in dispute and the adjoining house belonging to defendants Nos. 2 and 3 were described as one house and numbered as 136 in the municipal records, and the names of defendants Nos. 2 and 3 alone were entered therein.

Suits of this nature are ordinarily based on the entries in the records and it was, therefore, a little unusual that the plaintiff, who according to the evidence was living at Calcutta and whose name did not appear in the municipal records, was also impleaded as a defendant. It further appears that Akhlaq Ahmad who is a Mukhtaram of defendant No. 1. the Municipal Board of Allahabad, and looks after the cases of the Board is a relation of defendants Nos. 2 and 3. However, a preliminary decree was passed on 11-4-1944 under Order XXXIV. Rule 4, C. P C against all the persons impleaded as defendants. An application for preparation of the final decree was made on 26-7-1945 whereupon the Court ordered notices to be issued to the defendants of that suit. What happened in relation to the service of the notice upon the plaintiff is the central point in the present case, and the crux of the whole matter is whether the service was false and fraudulent.

The evidence on record leaves No. room for doubt that the plaintiff was living with his family at Calcutta for the preceding eight or ten years and the evidence led by the plaintiff on this point has not at all been controverted. Service of the notice was. however, made by affixation of the notice at the plain tiff''s house al Allahabad with the report that the house was open and the members of the plaintiff''s family were present there. The most remarkable thing about the service was that Sakhawat Ali defendant No. 2 who was a co-defendant in suit No. 174 of 1943 and whose relations with the plaintiff were obviously strained, accompanied the process server, and the endorsement regarding affixation of notice al the plaintiff''s house was scribed and signed by Sakliawal Ali. The report of the process server that the plaintiff had gone out somewhere (which meant that he had gone out temporarily) and that the members of his family were present there was palently false and its falsity has not been challenged.

In fad, No. evidence at all has been adduced by the defendants to prove the correctness of this report. On the basis of this report the Court held the service to be sufficient and passed a final decree on 11-11-1945 in the absence of the plaintiff. What happened subsequent to the final decree is No. less significant Although the decree passed in suit No. 174 of 1943 was against all the defendants, No. attempt appears to have been made by the Municipal Board to realize the decretal amount from defendants Nos. 2 and 3 who were residing at Allahabad and their house was not tried to be sold. The plaintiff has stated that No. notice of any proceeding in execution was served upon him nor did lie ge! information of any such proceeding. There is also the un-rebutted testimony of a relation of the plaintiff who was in charge of the plaintiff''s properly at Allahabad, of a person who was in occupation of the house as a tenant. and of two residents of the locality that there was No. sale proclamation or announcement of sale in respect of the house, and that they knew nothing of the sale before delivery of possession.

On the lop of it all is the fad that the house which, according to the evidence, was worth Rs. 5,000 or 6,000 was auctioned for Rs. 70 and purchased by Bhojai defendant No. 4. In the plaint it has been clearly alleged by the plaintiff that defendant No. 1 was a Benamidar for defendants Nos. 2 and 3 and the purchase money was actually paid in them, and yet all that is found in the written statement of defendant No. 4 in regard to this matter is that the allegations contained in the plaint are not admitted. The plaintiff has stated in his evidence that Bhojai defendant No. 4 is an asami of Sakhawat Ali defendant No. 2 and it is Sakhawat Ali and not Bhojai who is in possession of the house. This statement too has remained unrebutted and even Bhojai has not entered the witness box to assert that he is the real purchaser and is in possession of the house. I may note that the plaintiff has stated that his failure to pay the decretal amount was due to the fact that he had been given to understand that defendants Nos. 2 and 3 had already paid it.

8. In view of these facts and circumstances the finding of the learned Civil Judge cannot be said to be unjustified. Mr. R. C. Saksena has laid great stress on the fact that there was an interval of about three years between the passing of the final decree and the commencement of execution proceedings and has urged that if defendants Nos. 2 and 3 had been guilty of the fraud attributed to them there was No. reason why the execution of the decree should have been postponed for such a length of lime. The delay in the commencement of the execution proceedings is. however, not inconsistent with the fraud alleged by the plaintiff and it is insufficient to counteract the force of the other facts and circumstances. Fraud, if it is to succeed, has to move stealthily and cautiously and there may be situations which require its movement to be very slow and even discontinuous. It may meet with obstructions or come across dangers of detection, or even otherwise proceed with extra caution and restraint, and for a variety of reasons its course may be suspended to be resumed again in more favourable circumstances.

Execution of a scheme of fraud may thus be spread over a considerable period of time and its completion may be delayed for reasons known only to the authors of the scheme and not ascertainable in the Court. But if the facts and circumstances of case clearly disclose a scheme of fraud running through a proceeding or a transaction, it is immaterial that the reason for the relay in carrying out the scheme to its completion has not been discovered Reference in this connection may be made to the following observations of the Privy Council in Satis Chandra Chatterji v Satish Kantha Rov AIR 1923 PC 73:

""Charges of fraud and collusion must, No. doubt, be proved by those who make them proved by established facts or inferences legitimately drawn from those facts taken together as a whole Suspicions and surmises and conjecture are not permissible substitutes for those facts or those inferences, but that by No. means requires that every puzzling artifice or contrivance resorted to by one accused of fraud must necessarily be completely unravelled and cleared up and made plain before a verdiel can be properly found against him. If this were not so. many a clever and dexter our knave would escape "

IT is, therefore, not necessary to speculate about the reason for the delay in the com mincemeat of the execution proceedings or to unravel the mystery behind it when the facts and circumstances of the case positively establish the existence of a scheme of fraud I may only say that the delay was not incompatible with the scheme. I may also point out that if the final decree was the result of a false and fraudulent service of notice upon the plaintiff, that alone and by itself would entitle the plaintiff to have the decree set aside irrespective of any other thing. This disposes of the first point raised by the learned counsel for the appellant.

9. Mud) need not be said about the second point. The final decree in dispute is being impeached not on the ground of mere irregularity in the service or want of service of notice, but on the ground that a false report of service on the plaintiff was fraudulently secured by defendant No. 2 and the decree passed by the Court was based on that false report. It is well settled that when there is a deliberate suppression of summons or notice issued to a person on a false report relating to service of summons or notice upon him is secured from the process-server, and the Court is thus led to pass an ex parte decree or order against such person without his acquiring know ledge of the suit or proceeding against him, the decree or order must be regarded as vitiated by fraud. This is particularly so when the suppression of the summons or notice or the securing of a false report of service from the process server, is found to be part of a larger plan of deceit which has for its object some thing more than merely obtaining an ex parte decree or order. Vide Rameshwar Vs. Din Dayal, : Jogesh Chandra Ghose and Others Vs. Prosanna Kumar Talukdar and Others, . and AIR 1942 217 (Oudh)

10. As to the third point Mr. K. C. Saksena is certainly correct in saying that the C. P C does not expressly require notice of an application for the preparation of a final

decree (sic) be served upon the persons against whom the decree is sought to be passed. But, having regard to the fundamental rule of judicial procedure expressed in the maxim ''audilteram partem'', it has been consistently held that notice of such an application must be issued, and that a person against whom a final decree has been passed without notice is entitled to have it set aside: vide Sri Maruti Swamiar Vs. A. Subramania Ayyar, ; Muchi Dola Behera and Others Vs. Jujisti Janni and Others, Bibi Tasliman v. Harihar Mahto ILR(1905) Cal 253 (FB); AIR 1944 181 (Nagpur) Hire Khan Moti Khan v. Mst Narbada Bai AIR 1952 Nag 177. and Tikaram Namaji v. Tara Chand Gujoba AIR 1954 Nag 135, I must also mention that it was pointed out by Bose, J in AIR 1944 181 (Nagpur) that the form of final decree given in appendix D to the C. P C shows that it is only after hearing the parties that such a decree can be passed and his Lordship observed that a notice was. therefore clearly necessary Following the view taken in these decisions. I hold that notice of the application for the preparation of the final decree in suit No. 174 of 1943 had to be issued to the present plaintiff before a final decree eoul;l be passed against him.

11. Apart from this, once the Court does issue notice to a person, it has "to --be served in the proper manner even though it was not imperative for the Court to issue the notice and if there is fraud in the service of the notice the decree passed by the Court on the basis of fraudulent service of the notice is vitiated just as much as it would have been if the issue of the notice had been imperatively required by law The contention of Mr. Saksena that fraud committed in relation to the service of a notice issued by the Court but not required to be issued under any statutory provision cannot affect the validity of a decree or order passed on the basis of such service is manifestly unacceptable.

12. I now come to the fourth point raised by Mr. K. C. Saksena. It would be seen that this point involves two questions, one a question of fact and the other a question of law, and the question of law hinges on the question of fact. What has first to be seen is whether the appellant was a bona fide purchaser, and it is only if this question is answered in the affirmative that the question can arise whether the title acquired by him under the auction sale is liable to be disturbed. As already stated, the case of the plaintiff is that the appellant was a Benamidar for defendants Nos. 2 and 3. If this was so, it is obvious that the appellant could not be a bona fide purchaser in fact, the appellant was not in that case a purchaser at all, the real purchasers having been defendants Nos. 2 and 3. It is clear from the judgment of the learned Civil Judge that he has accepted this case of the plaintiff It is true that he has not expressly said that the appellant was a Benamidar for defendants Nos. 2 and 3. but the finding that the entire transaction commencing from the institution of suit No. 174 of 1943 and ending with the auction sale of the house in dispute was a collusive and fraudulent contrivance adopted by defendants Nos. 2 and 3 with the object of securing the house for themselves tantamounts to a finding that the appellant was a mere Benamidar.

The learned Judge has referred to the statement of the plaintiff that the appellant is an asami of defendant No. 2, and that defendant No. 2 and not the appellant is in possession of the disputed house He has drawn attention to the fact that these allegations have remained unrebutted and even the appellant has not had the courage to enter the witness box to deny them. Evidently, therefore, it has been found by him that the appellant is not the real purchaser of the house. This finding too, the finding on fraud with which it is intimately bound up, is a finding of fact. The finding cannot, consequently, be questioned in second appeal, and it is also borne out by the material on record. This being the position, the appellant cannot claim to be a person who innocently acquired the house without participating in or having knowledge of the fraud that culminated in the auction sale of the house in his name, and the factual basis necessary for the fourth point urged in the appeal is completely destroyed.

13. Even if it is assumed that the appellant was not a party to the fraud and was a bona fide purchaser, the auction sale cannot, in the circumstances of the case, be upheld and left intact. The reason why I emphasise the circumstances of the case is this. It cannot be laid down as an inflexible rule of law holding good in all situations that an auction sale in favour of a bona fide purchaser would remain unaffected even if the decree on which it is based is found to have been fraudulently obtained, just as it cannot be stated as a broad proposition that an auction sale must invariably fall with the decree on which it is based and No. protection can ever be claimed even by a bona fide purchaser if the decree which led to the auction sale is found vitiated by fraud.

In setting aside on the ground of fraud a decree and an auction sale in execution of the decree, the Court does not enforce a statutory remedy having its scope and effect fixed by the terms of a statutory provision, but administers relief on principles of equity, justice and good conscience, and in doing so it is naturally called upon sometimes to balance conflicting claims to its help and protection and then to adopt its decision to the demands of the situation. Which of the two innocent persons, the victim of a fraudulent decree or the bona fide purchaser at an auction sale held in pursuance of the decree, should be allowed or left to suffer cannot be determined by the Court in consonance with equity, justice and good conscience, without taking into account the extent of their respective sufferings, their conduct, and other relevant considerations. The Court has, there fore, to decide in the context of the facts and circumstances of each case whether or not a bona fide purchaser at an auction sale should be permitted to retain the benefit of the sale when it is found that the decree which forms its basis had been obtained by fraud.

14. It may be pointed out in this connection that, where a sale is set aside under O. XXI, Rule 90 of the C. p. C on the ground of fraud in publishing or conducting it. the question whether the auction purchaser is a party to the fraud or is a bona fide purchaser is not a relevant consideration. Order XXI, Rule 90 of the C. P. C provides a

statutory remedy and there is nothing in its terms to exclude from its operation bona fide auction purchasers or restrict its application to those auction sales in which the auction purchaser was not a party to the fraud: vide Jagdeo and Another Vs. Ujiyari Kunwar and Another, and Mahipali Haldar v Atul Krishna Maitra AIR 1949 Cal 212 But. as I have said above, a suit to set aside, on the ground of fraud a decree and an auction sale held in execution thereof is not a statutory remedy and the kind of decree that the court will pass in suits of this nature will vary with what equity, justice and good conscience demand in varying circumstances.

15. The circumstances of this case have already been mentioned and I need act repeat them. All that I need say is that if the auction sale in favour of the appellant were to be upheld the plaintiff who was the victim of a fraud would be deprived of a property worth more than Rs. 5,000/- and the appellant who is not even in possession of the property would be enabled to retain it although he spent (assuming that the purchase money was paid by him) Rs. 70/- only in acquiring it. The retention by the appellant of the benefit accruing to him under the auction sale would, in my opinion, be manifestly unconscionable. Even if, therefore, the appellant had been the real and a bona fide purchaser he could not in equity have been permitted to retain the house in dispute and the plaintiff would have been entitled to the relief claimed by him, although in that event the plaintiff might have been required to pay to the appellant the sum of Rs. 70/- spent by him in the auction purchase.

16. Mr. K. C. Saksena has strongly relied on Jagarnath Prasad v. Mst. Bahurani (1921) 62 Ind Cas. 594 (Pat), a case decided by a learned Single Judge of the Patna High Court, in support of his contention that an auction sale in favour of a bona fide purchaser who was not a party to any fraud cannot be set aside even if the decree in execution of which the sale was held is found to have been obtained by fraud. An examination of the case mentioned above would, however show that No. fraud was found proved and the fraud alleged was not extraneous to the decree. It would be seen that it was also observed in that case that the fraud must be proved as being extraneous to the decree. In the instant case the fraud vitiating the decree was not in relation to matters which the Court was called upon to decide but in relation to the service of the process issued by the court and thus it was clearly extraneous to the decree, and Mr. K. C. Saksnea cannot, therefore, derive any assistance from the case referred to above.

The next case on which reliance has been placed is Gopal Porai v. Swarna Bewa (1922) 64 Ind. Cas. 611 (Cal), a case decided by a Division Bench of the Calcutta High Court. The judgment of that case is very short and No. general proposition of law has been laid down. The other cases cited by the learned counsel do not relate to decrees fraudulently obtained and as such they have No. bearing on the present case and need not be referred to. The true legal principle has, if I may lay so with respect, been enunciated in Bireswar Ghose Vs. Panchcouri Ghose and Others, by

Mookerjee, J. I may also state that the circumstances in Bireswar Ghosh''s case resembled in essential features the circumstances of the present case and I may quote below the closing observations of Mookerjee, J., which should apply here with all their force:

"The fact remains that the appellant was able to secure the property for an insignificant sum. We cannot hold, in these circumstances that the bona fides of the first or of the second purchaser were as unquestionable as their good fortune in acquiring a property at a fraction of its value without contest or aompetition. In our opinion, it would be a well-merited reproach to the administration of justice if we were compelled to uphold execution purchases of this description, by the application without discrimination of the formula of bona fide purchase for value without notice." This finishes the fourth point raised by Mr. K. C. Saksena.

17. The fifth and the last point remains to be considered. If the present suit had been merely for setting aside the auction sale in favour of the appellant on the ground of fraud in publishing or conducting the sale there is No. doubt that the suit would have been barred by Order XXI, Rule 92 (3) of the C. P. C. What is, however, sought to be set aside by means of this suit is not merely the auction sale but also that decree itself in execution of which the auction sale was held, and as such the suit is outside the bar of Order XXI, Rule 92 (3) of the C. P. C. In Bhagwan Das Marwari and Others Vs. Suraj Prasad Singh and Others it was held by a Division Bench of this Court that a suit to set aside a sale on the ground of fraud covering wider grounds than those mentioned in Order XXI, Rule 90 (1) of the C. P. C. is maintainable and is not barred by Order XXI, Rule 92 (3) if the C. P. C. The fraud proved in this case was not confined to the publication and the conducting of the auction sale but also covered and vitiated the decree upon which the auction sale was founded. In such circumstance Order XXI, Rule 92 (3) of the C. P. C. has application.

18. All the points raised on behalf of the appellant, therefore, fail, and the appeal is accordingly dismissed with costs.