(1868) 06 CAL CK 0002

Calcutta High Court

Case No: Miscellaneous Regular Appeal No. 156 of 1868

Janali		APPELLANT
	Vs	
Janali Chowdry		RESPONDENT

Date of Decision: June 8, 1868

Judgement

Sir Barnes Peacock, Kt., 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 (7 W. E., 312) that a sale under a decree to a bond fide purchaser is valid, notwithstanding the decree may be reversed upon appeal, and it seems to follow that a bond fide sale, under 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.

2. 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 bond 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.

3. One of these cases is Mathew Manning''s Case, (4 Coke''s Reports, Ft. 8, p. 94). 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.

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

5. The other case, to which reference is made by Mr. Justice Norman, is that of Goodyere v. Ince, (3 Coke''s Rep., 246), 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 himself upon an elegit, is no sale by force of the writ, which being" reversed, the party shall be restored to the term itself."

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

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

8. 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 Lower Court, and neither of the parties, therefore, had an opportunity of calling witnesses upon that issue.

9. 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; secondly, that Bhairab Chandra, the naib of the ijaradar, was present at the sale; thirdly, the inadequacy of the price realized; 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 Munsiff u/s 354[2] 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 may think fit upon the trial of that issue, and we think that the Munsiff 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.

10. It does not appear what was done with the purchase-money paid by the auction-purchaser, 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 Munsiff 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.

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[1][Sec. 58:--No appeal shall He from a judgment passed ex parte against a defendant who has not appeared, or from a judgment against a plaintiff by default for non-appearance. But, in all such cases, if the party against whom judgment has been given shall appear, either in person or by agent, if a plaintiff within fifteen days from the date of the Collector''s Order, and if a defendant within fifteen days after any process for enforcing the judgment has been executed, or at any earlier period, and shall show good and sufficient cause for his previous non-appearance, and shall satisfy the Collector that there has been a failure of justice, the Collector may, upon such terms and conditions as to costs or otherwise as he may think proper, revive the suit and alter or rescind the decree, according to the justice of the case. But no decree shall be reversed or altered without previously summoning the adverse party to appear and be heard in support of it. (Amended by Act VI of 1862, of the Bengal Council).

Revival, reversal, and alteration of decrees ex parte or by default.

Sec. 105:--If the decree be for an arrear of rent due in respect of an under-tenure, which by the title-deeds or the custom of the country is transferable by sale, the judgment-creditor may make application for the sale of the tenure, and the tenure may thereupon be brought to sale in execution of the decree, according to the rules for the sale of under-tenures for the recovery of arrears of rent due in respect thereof contained in any law for the time being in force. But no such application shall be received when a warrant of execution has been previously issued against the person or moveable property of the judgment-debtor, so long as such warrant remains in force. If after sale of an under-tenure any portion of the amount decreed remains due, process may be applied for against any other property, moveable or immovable, belonging to the debtor, and any such immovable property may be brought to sale in the manner provided in Section CX of this Act.]

Sale of transferable tenures in execution of decrees for arrears of rent.

[2]Trial of issues by Lower Court on reference from Appellate Court.

[Sec. 854 :--If the Lower Court shall have omitted to raise or try any issue or to determine any question of fact which shall appear to the Appellate Court essential to the right determination of the suit upon the merits, and the evidence upon the record is not sufficient to enable the Appellate Court to determine such issue of question of fact, the Appellate Court may frame an issue or issues for trial by the Lower Court, and may refer the same to the Lower Court for trial. Thereupon the Lower Court may proceed to try such issue or issues, and shall return to the Appellate Court its finding thereon, together with the evidence. Such finding and evidence shall become part of the record in the suit; and either party may within a time to be fixed by the Appellate Court, file a memorandum of any objection to the finding, and after the expiration of the period so fixed, the Appellate Court shall proceed to determine the appeal]