(1869) 05 CAL CK 0035

Calcutta High Court

Case No: Special Appeal No. 2778 of 1868

Mahima Chandra Kundu		APPELLANT
	Vs	
Moulvi Nuruddin and Others		RESPONDENT

Date of Decision: May 3, 1869

Judgement

Bayley, J.

This was a suit brought for the declaration of the plaintiff''s title, and for the cancellation of a summary order passed in execution of a decree in 1866. The plaintiff alleged that the lands in dispute belonged to one Baxi Mahima Chandra, who on the 21st July 1866 sold the same to the plaintiff; that the defendant attached the said lands, in satisfaction of his decree against the vendor; and that the plaintiff set up a claim under the provisions of section 246, which was rejected. The answer was that there was no real sale; that the transaction was in fact only a paper one; and that the real object of it was to keep the property out of the hands of the creditors. The first Court held, that the plaintiff had failed to show that the sale on which he relied was in fact a real transaction; that, although certain deeds were executed, purporting to show that there was such a transaction, still no consideration had passed, and that the conduct of the parties in respect to the kabala indicated chat the sale was not a bona fide transaction. The first Court, accordingly, dismissed the plaintiff''s suit. On appeal, the lower appellate Court adopted the reasonings of the first Court, and upheld that judgment.

2. In special appeal, it is contended, that, as the defendant pleaded that the deed of sale set up by the plaintiff was in fraud of creditors, it was for him to prove his allegation. Two cases, Lal Behari Butt v. Srinath Mookerjee [(2)], and Lalla Boodropershaud v. Benode Bam Sein 3 B.L.R. A.C. 71, have been cited in support of the contention.

3. I am of opinion that neither of these decisions applies to the facts of the case now before us.

4. In the first case the facts were not similar, that is to say, the circumstances which constituted proof of fraud in that case, i.e., the value of the paper, place of purchase, &c, &c., do not exist in this; and in the second place, there is nothing to show that there was in those cases an adverse order u/s 246. But, irrespective of those decisions, it appears to me clear that, when in this suit for setting aside a summary order under the provisions of sections 246, the plaintiff comes in under the allegation that the order was illegal, it was for him to prove that it was so, and that such ought to he set aside as illegal.

5. I would add that it was not entirely on the plaintiff''s evidence alone, but on the conduct of parties and all the circumstances surrounding the transaction in respect of the transfer that the first and the lower appellate Courts have concurrently found that the transaction of sale was not a bona fide one.

6. In this view of the case, I see no reason to interfere, and I would, therefore, dismiss this appeal with costs.

Mitter, J.

7. I am of the same opinion. When a plaintiff asks for the confirmation of his title, the onus is always on him to make out that title to the satisfaction of the Court. The mere fact of the defendants admitting the execution of the deed, on which the plaintiff relies, is not sufficient to relieve him from the onus of proving that the title which that deed purports to create is a substantial one.

8. Kabalas and other instruments, by which a property is transferred from one person to another, are mere evidence of such transfer; and, when a plaintiff alleges that he is in possession of the property, and asks for the declaration of his title only, the bona fides of that title being questioned by the defendant, it is for the plaintiff to make out that that title is really and substantially what it purports to be on the face of the deed upon which be relies, I do not think that the plaintiff in such a case has a right to say--"declare my title if the defendant cannot prove that it is a fictitious one." But be this as it may, it is clear that a party seeking to get rid of an order passed against him u/s 246, is bound to show that the title, under which he comes, is a perfectly good and valid one. In the present case it has been already decided, in the execution department, that the judgment-debtor was in possession of the property, notwithstanding the alleged transfer set up by the plaintiff. That proceeding ought to be at least taken as a prima facie proof against the plaintiff, and he is, therefore, bound to show that the Court came to an erroneous conclusion in the execution department.

9. With reference to the first case cited by the special appellant, I would observe that it does not appear from that case that there was an adverse order u/s 246. The second case has no bearing upon the question now before us. That was a case instituted by the decree-holder, who had been unsuccessful in the execution department, for obtaining a declaration that the property which was attached by

him, was the property of his judgment-debtor; and although the defendant had set up a sale from the judgment-debtor, the plaintiff having admitted the factum of the sale, was held to be bound to prove that the transaction was a fraudulent one. Whether there was any plea of fraud or not, it is clear that the plaintiff in that case having come into Court to get rid of a judgment u/s 246, was bound, under any circumstances, to make out a prima facie case. In the present case, however, although the plaintiff set up a deed of sale, both the Courts below have found that the transaction was a colorable one, and they came to this conclusion, upon the ground, that there was no interchange of the consideration-money, and that the kabala was executed in such a manner, and under such circumstances, that it could not be taken to represent a bona fide transaction. Under these circumstances, the grounds taken in this special appeal must fail, and it is accordingly dismissed with costs.

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(1) Before Mr. Justice Phear and Mr. Justice Hobhouse.

Lala Rudra Prasad (one of the defendants) v. Binode Ram Sen and Others (Plaintiffs).* [27th August, 1868.]

Baboo Kishan Sakha Mookerjee, for appellant.

Baboo Ramesh, Chandra Mitter, for respondents.

JUDGMENT.

THE judgment of the Court was delivered by

Phear, J.--We think that the Judge of the lower appellate Court has dealt erroneously with this case. He seems to have entered upon it with the impression, that the order of the Principal Sudder Ameen, made in the execution proceedings, and there allowing the present defendant''s claim, could, in some way or other, affect the burden of proof in this suit. It is clearly not so. The only effect of the Principal Sudder Ameen''s order, u/s 246 of the Civil Procedure Code, was to drive the plaintiff to bring this suit for the purpose of asserting his right, and further to bring this suit within twelve months, But the suit having once been brought, the burden lies upon the plaintiff to give some prima facie proof of his claim. Now, his claim to the property, which is the subject of the suit, is nothing other than this, that the property is the properly of his judgment-debtor; and as such he is entitled to take it in execution of his former decree. It does happen in this case that the defendant affords the plaintiff the prima facie proof which he wants, for the defendant, in his written statement, admits that the property was the property of the judgment debtor, and says that it has passed to him (the defendant) by a conveyance from that judgment-debtor. At this stage, then, the burden of proof is shifted, and it becomes incumbent upon the defendant to show that there has been a transfer of the property from the judgment-debtor to him. But here again he like the plaintiff,

can appeal to the words of his opponent for the purpose of supplying at least prima facie evidence on this point; for the plaintiff in his plaint, clearly admits that there was a deed of sale, from the plaintiff to the defendant, executed between the parties only; he asserts that this document is invalid for the purpose of transferring the property as against him (the plaintiff), because it was concocted in fraud and with the direct intention of defeating his (the plaintiff''s) just rights.

In this view of the case, it is clear that the lower appellate Court was wrong in enquiring whether or not the deed was executed. The parties stood before the Court, with the admission by the plaintiff himself, that a deed executed by the judgment debtor, in favour of the defendant, did actually exist. The matter, which was in contest between the parties, was whether or not that was a good and valid deed; whether it had the effect which in terms it purported to have. The plaintiff said it had not, as we have already mentioned, because he said it was a fraudulent act against him, and, therefore, must be treated as a nullity. Now, if this be so, nothing can be, plainer, we think, than this; that the burden of proving the allegations of fraud and collusion lay upon the plaintiff. The plaintiff made those allegations; and unless those allegations were proved, there was a good title in the defendant; there was a transfer of the property from the judgment-debtor to the defendant, which the judgment-debtor himself could not gainsay; and it is we think difficult to draw any substantial distinction between the case as it thus rests between the parties and the case of Sreeman Chunder Dey v. Gopal Chunder Chuckerbutty 11 M.I.A. 28. But even apart from the decision of the Privy Council, which is there reported, it is almost elementary to say that, where a litigant party''s case depends upon the establishment of fraud, in the conduct of the other side, it lies upon him to prove the fraud. Now, it seems to us that the Judge of the lower appellate Court has decided the suit between the parties, not upon the issue of fraud, which it lay upon the plaintiff to make out, but upon the false issue, whether or not the defendant''s kabala had ever been executed, which issue, if it really arose between the parties, no doubt would rightly rest upon the defendant.

Under these circumstances we think that we must reverse the decision of the lower appellate Court, and remand the case to that Court for retrial upon the issue, whether or not the kabala, executed by the judgment-debtor to the defendant, was made to the knowledge of the defendant, in fraud of the plaintiff, and to defeat his rights in execution of the Civil Court decree. If the Judge should be of opinion that the deed was made in fraud of creditors, among whom the plaintiff was one, he ought to find this issue in the affirmative, even though he should not come to the conclusion that the judgment-debtor and the defendant had, at the time of the execution of the deed, a specific intention to defraud the plaintiff personally. Costs will abide the event.

* Special Appeal, No. 791 of 1868, from a decree passed by the Judge of Beerbhoom, dated the 14th January 1868, reversing a decree of the Principal Sudder Ameen of

that district, dated the 24th June 1867.

(2) Before Mr. Justice Phear and Mr. Justice Habhouse.

Lalbehari Dutt (Plaintiff) v. Srinath Mookerjee and Others (Defendants). [3rd June, 1868.]

Phear, J.--In this suit the plaintiff avers that he is the assignee of a decree, and that the defendant has seized and sought to sell this decree as being part of the assets of his assignor, and he sues to establish his right to this decree by virtue of his purchase as against the defendant. The defendant appears to admit that the assignor did, as a matter of fact, transfer his decree to the plaintiff, but he alleges that that transfer was fraudulent and fictitious, and made with the intent to defraud him and other creditors. We are not sure whether the statement of the defendant actually took this form in words, but there is no doubt that the defendant did allege that the plaintiff was not entitled to the declaration of his right by reason of the transfer being fraudulent and fictitious; and his counsel has, before us put it in form, which I have just now given to it, and there is no doubt that it must take that form, in order that it may be of any value to the defendant.

On this state of things, the lower appellate Court has decided, and decided as we think rightly, that "the onus of proof was clearly on the defendant," which means that the plaintiff was entitled to obtain the declaration he Fought, unless the defendant succeeded in showing the fraud against him which he alleged. The lower appellate Court, at some length, refers to what it considers to be the material evidence in the case, and arrives at the conclusion that this evidence serves to make out the defendant''s allegation.

I have marked, by figures the different items of proof which he thus refers to. I find that they amount to about seven or eight in number. I do not propose now to discuss them in detail. I think it sufficient to say that, in my opinion, no one of them is evidence of fraud against the defendant, or of fictitious fabrication of the document, with intent to defraud the defendant or other creditors, among whom he had a right to class himself. The first of those items (for I will mention one or two merely to show their character) is that "the deed is written upon a 75 rupees stamp, while a 50 rupees stamp would have been sufficient." I am perfectly unable to see how that circumstance, taken by itself, should indicate any intent to defraud the defendant or any other of his creditors. The second is that "the stamp, being purchased as shown, in another district, is still more suspicious." The Judge must rather mean "is still more indicative of a fraudulent intention against the defendant." As in the first instance I have given, so here too I am utterly unable to see that this taken by itself, indicates in the least degree, an intent to defraud the defendant or any other person, I think that these two instances afford a fair example of the materials upon which the Judge relies, and serve to show that he has come to a decision against the plaintiff, upon evidence, which is not legally sufficient

to support his decision.

It is true that some of these might have a tendency to show that the date on the deed was anterior to the actual date when the deed was made; but as that antedated time, if it was an antedated time, did not carry back the purchase by the plaintiff to a time preceding the title of the defendant, it was of no use for the purpose of defrauding the defendant. It can therefore be no evidence of specific fraud, such as it was necessary for the defendant to establish in this case, although it is possible that it might have served to throw a cloud upon the perfect honesty of the transaction, exhibited in the transfer deed, which would have been valuable as adding force to any evidence of fraud against the defendant, had there been any such evidence given in the cape. It might for instance, in such a case, have enabled the Judge to decide, without difficulty, between the evidence of fraud given against the defendant on the one side, and the evidence of bona fides which the plaintiff might have put upon the record on the other. But here there is absolutely no evidence, other than this very evidence in question, of intention on the part of the plaintiff, and his transferor to commit, by the transfer, a fraud on the defendant personally, or on any class of persons among whom he fell. I do not, however, wish to say that I think that these materials have the effect, even taken altogether, of throwing any such cloud as I have suggested on the character of the transfer. The case is here as a Special Appeal, and I do not think that there is any necessity for me to express an opinion upon that point.
It follows then that as the evidence upon which the Judge relied is insufficient for the purpose of supporting the defendant''s plea of fraud, and it is not suggested that there is any further evidence bearing upon that issue, which he has neglected to notice, and as further, the plaintiff was entitled to succeed, unless the defendant did make out his allegation of fraud and dishonesty on the part of the plaintiff against himself, the decision of the Judge must be reversed, and the plaintiff''s suit decreed.

It is true that the Judge has, in the last part of his judgment, made allusion to the evidence, in support of the bona fides of the consideration alleged to have been paid by the plaintiff, and has apparently expressed his opinion that the bona fide payment of that consideration is not made out; but with regard to that, I must observe that it was not competent for him, after having started with saying that the onus lay upon the defendant, to turn back again, and go into the plaintiff''s case, and say that the plaintiff ought not to succeed, because he had not established it. I think, further, that the comments he has made upon the evidence as to the payment of consideration, really show that he was mainly guided in the conclusion at which be arrived, with regard to that issue more by speculation than by any proper consideration of the intrinsic value of the evidence. But it is not necessary for us to make our decision turn, in any way, upon what the lower Court has done on this point, because the plaintiff is entitled to succeed upon the defendant''s failing to prove his plea of fraud and dishonesty.

The plaintiff must have his costs in all the Courts.