

## Rajkumar Sarkel Vs Rajkumar Mali and Others

**Court:** Calcutta High Court

**Date of Decision:** March 2, 1915

**Citation:** 33 Ind. Cas. 767

**Hon'ble Judges:** Richardson, J; Asutosh Mookerjee, J

**Bench:** Division Bench

### Judgement

1. This is an appeal by the defendant in a suit for two-fold relief on the ground of fraud. The case for the plaintiffs is that on the 8th June 1907, the

defendant, by fraudulent suppression of processes, obtained an ex parte decree against them, for possession of the second property now in

dispute, that the decree-holder not only executed the decree in respect of that property but also for realisation of the costs allowed to him, and that

he thus managed to purchase the first property at the sale which followed without the issue of the usual notices and proclamation. The present suit

was instituted on the 13th May 1911 to set aside the alleged fraudulent decree and to recover possession of both the properties. The Courts

below have found that it is not open to the plaintiffs to have the alleged fraudulent decree vacated inasmuch as the time prescribed by Article 95 of

the first Schedule of the Indian Limitation Act for the purpose had elapsed before the institution of the suit. Under the Article, a suit for relief on the

ground of fraud must be instituted within three years from the date of discovery of the fraud. The Courts below have found that the fraud, if any,

was brought to the knowledge of the plaintiffs more than three years antecedent to the suit. From this point of view, it is plain that the plaintiffs

cannot obtain a declaration that the decree was obtained by fraud and they are consequently not entitled to recover the property covered by the

decree. But with regard to the sale in execution of the decree for costs, the Courts below have adopted the view that although the plaintiffs are not

competent to have the decree set aside, yet it is open to them to have the sale vacated on the ground that it has been held in execution of a

fraudulent decree; in support of this proposition, reliance has been placed upon the decision in *Ram Narain Tewari v. Shew Bhunjan Roy* 27 C.

197. That case is clearly distinguishable. There an ex parte decree had been obtained by fraud. The defendants applied to have the ex parte decree

set aside on the ground that summonses had not been duly served on them; this application was granted. They subsequently sued to have the sale

in execution of that decree set aside on the ground that it had been held on the basis of a fraudulent decree and could not consequently be

sustained. It was argued in answer to the suit that as the decree had already been set aside, no question of the validity of the decree could be

investigated in the suit, and consequently the sale could not be successfully impeached. This contention was rightly overruled, and it was held that

as the decree was proved to have been obtained by fraud, the sale also must be vacated, although it was not necessary for the then plaintiff to set

aside the decree on the ground of fraud, as he had been previously successful on his application to set aside the decree as an ex parte decree. That

case plainly bears no analogy to the one before us. Here, as has been found by the Courts below, it is no longer open to the plaintiffs to have the

decree vacated on the ground of fraud; their right in this respect has been extinguished by limitation. It is consequently not open to them to have

further relief on the ground of fraud. As it is not competent to the plaintiffs to invite the Court to vacate the decree on the ground of fraud, it is not

open to them to have the sale also set aside on the ground of fraud in the decree. So long as the decree is not successfully impeached as fraudulent,

the sale must stand operative; the grant of the one relief is an essential pre-requisite for the attainment of the other. A sale in execution of a

fraudulent decree is not a void but a voidable sale; till vacated by an appropriate proceeding, the rights created thereby are effective. It was

consequently essential that the plaintiffs should seek, as they did in their plaint, to have the decree set aside on the ground of fraud before they

could have the sale vacated. But the plaintiffs have lost their right to attack the decree; they cannot consequently attack the sale.

2. The result is that this appeal is allowed, the order of the Court below set aside, and the suit dismissed with costs in all the Courts. We assess the

hearing fee in this Court at one gold mohur.