

**(1909) 03 CAL CK 0040**

**Calcutta High Court**

**Case No:** None

Moti Lal Adhikari

APPELLANT

Vs

Ramdoyal Das

RESPONDENT

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**Date of Decision:** March 31, 1909

**Final Decision:** Dismissed

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### **Judgement**

Sharfuddin, J.

The facts that give rise to the present appeal are that there are two plots of land which belonged to the ancestors (father and paternal uncle) of defendant No. 1, but were purchased by the plaintiff in execution of a decree against them obtained by him. This purchase was admittedly made in the name of defendant No. 2, Ram Tome Das. The plaintiff purchased the land on the 14th of January 1895, obtained a sale certificate and got delivery from Court on the 26th of August 1895. It is not clear whether possession was given to him through Ram Tome Das or to him directly. It is, however, alleged on behalf of the plaintiff that the judgment-debtor continued in possession and defendant No. 1, his only heir (his brother's son), did not give up possession of the land, which necessitated the bringing of the present suit.

2. Defendant No. 1, on the other hand, denies the plaintiff's purchase and his title to the land. The purchase was admittedly made in the name of defendant No. 2, Ram Tome Das. The plaintiff claimed that Ram Tome Das was his benamidar and the defendant No. 1 claimed that the same Ram Tome Das made the purchase for him, defendant No. 1.

3. The first Court held, that the plaintiff's purchase was valid and true. We may here observe that the present appeal refers to one of the plots, plot No. 1. Defendant No. 1 appealed to the Subordinate-Judge, and his appeal was dismissed. Defendant No. 1 now appeals to this Court and the only ground urged on his behalf is that the lower Courts ought to have held that the plaintiff's purchase, at a sale of the disputed land, being without the Court's permission was void and inoperative against the judgment-debtors; and in support of this he relies on the case of

Mahomed Gazee Chowdhry v. Ram Loll Sen 10 C. 757. The facts of that case are different from those of the present: In that case the plaintiff had applied for leave to bid at the sale, and his application was refused; and, notwithstanding this refusal he purchased at the auction.

4. It was, therefore, held that the plaintiff had been guilty of an abuse of the process of the Court in bidding at the sale and buying the property benami and that the sale, therefore, ought not to be enforced. In the present case no such application was made and hence there was no refusal by the Court. It appears from Ex. B.3 which is an order sheet that no application was made to the Court under the third clause of Section 294. It is very clear that a purchase by the decree-holder without permission of the Court is not ipso facto void but is valid until set aside under that section. That being so the sale itself made by the plaintiff, although without permission of the Court, was only voidable and not ipso facto void. We find that the Court did not exercise its discretion given to it by the third clause of Section 294 of the Code. In these circumstances, the ground taken by the appellant does not prevail.

5. The appeal is dismissed with costs.

Coxe, J.

6. I agree that the appeal should be dismissed; and, I wish only to add a few words. I am not prepared to say that if the defendant in a case of this nature could prove that he was unaware up to the institution of the suit that the decree-holder was the real purchaser of the property, he might not ask the Court to refuse to give effect to the sale. The case that has been cited by my learned brother is I think an authority for holding that the grant of such relief might be made in a subsequent suit and is not necessarily restricted to the Court which could take action under Clause 3 Rule 72, order 21: and, I think, having regard to the wording of the first clause of that rule, that it makes no real difference whether a decree-holder purchases property without leave or whether he asks for leave and the leave is refused. But it is quite clear that the Court is not bound to set aside the sale. The relief is clearly within the discretion of the Court. In the case cited, the learned Judges declined to exercise that discretion in favour of the defendant: and, I think we should refuse to exercise it in this case, though on somewhat different grounds. Here the defendant does not plead that he was ignorant that the decree-holder was the real purchaser. If he had been ignorant of that fact, it is difficult to see how he could obtain the relief to which he was clearly entitled under Rule 72, except by pleading the first clause of the rule in defense to this suit. But his defense has been that the second defendant was a benamidar for himself and not for the plaintiff. This plea is wholly inconsistent with the plea on which alone he could ask the Court to set aside the sale, namely, that the decree-holder was the real purchaser. This being so I agree that he is not entitled to relief and that the appeal should be dismissed with costs.