

(1923) 07 CAL CK 0043**Calcutta High Court****Case No:** None

Banka Behari Das

APPELLANT

Vs

Guru Das Dhar

RESPONDENT

Date of Decision: July 19, 1923**Citation:** 80 Ind. Cas. 257**Hon'ble Judges:** Rankin, J; Ghose, J**Bench:** Division Bench**Judgement**

B.B. Ghose, J.

The plaintiff, who was the auction-purchaser at a sale in execution of a decree for rent, sued both the decree-holder and the judgment-debtor for refund of the purchase-money and also for compensation on certain allegations made in the plaint. The suit was decreed in the primary Court against both the defendants. On appeal by the decree-holder defendant, the learned Judge dismissed the suit holding that it was not maintainable. The plaintiff appeals" to this Court and two questions have been raised on his behalf: (1) Whether a suit for refund of purchase-money is maintainable by the auction-purchaser on the ground that the judgment-debtor had no saleable interest in the land, and (2) whether the suit is maintainable on the ground of fraud of the defendants.

2. With regard to the first question, the learned Vakil for the appellant has placed before us all the cases decided by the different High Courts with reference to sales held after the CPC of 1908 came into operation. He admits that the general view is that such suits are not maintainable. It is only necessary to refer to the latest cases, which are Ram Sarup v. Dalpat Rai 68 Ind. Cas. 105: 43 A. 60 : 18 A.L.J. 905 : 2 U.P.L.R. (A.) 318; Balvant Raghunath v. Bala Malu 67 Ind. Cas. 360 : 46 B. 833 : 24 Bom. L.R. 908 : (1922) AIR (B.) 205; Tirumalaisami Naidu v. Subramanian Chettiar 45 Ind. Cas. 109 : 40 M. 1009 and Jaranu Mohamad v. Jathi Mohamad 46 Ind. Cas. 789 : 22 C.W.N. 760. He, however, relies on two cases in support of his contention that such a suit is maintainable, namely, the cases of Rustomji Ardeshir Irani v. Vinayak Gangadhar

Bhat 7 Ind. Cas. 955 : 35 B. 29 : 12 Bom. L.R. 723, and Prosanna Kumar Bhattacharjee v. Ibrahim Mirza 41 Ind. Cas. 924 : 36 C.L.J. 205. The case of Rustomji Ardeshir Irani v. Vinayak Gangadhar Bhat 7 Ind. Cas. 955 : 35 B. 29 : 12 Bom. L.R. 723 was under the CPC of 1882 as pointed out by the learned Chief Justice in Balvant Raghunath's case 67 Ind. Cas. 360 : 46 B. 833 : 24 Bom. L.R. 908 : (1922) AIR (B.) 205. The only case then in which a discordant note was struck is that of Prosanna Kumar Bhattacharjee v. Ibrahim Mirza 41 Ind. Cas. 924 : 36 C.L.J. 205. That case, however, was based on the decision in Rustomji Ardeshir Irani v. Vinayak Gangadhar Bhat 7 Ind. Cas. 955 : 35 B. 29 : 12 Bom. L.R. 723 which is no authority on the question where the sale was held under the Code of 1908. We must, therefore, follow the later case in our Court, Juranu Mohamad v. Jathi Mohamad 46 Ind. Cas. 789 : 22 C.W.N. 760, which is in agreement with the decision of all the other High Courts, and hold that such a suit is not maintainable.

3. The learned Vakil for the appellant further contends that there is a difference between the present case and the others, as in the present case the sale was a sale in execution of a rent decree and there is a warranty of title in the case of such a sale. The authority cited in support of this proposition is the decision in Abdul Sobhan Seikh v. Nakbar Mandal 16 Ind. Cas. 632 : 17 C.L.J. 652. That case, however, does not lay down any such rule, as it decides merely a question of estoppel by representation. That there is no such distinction as regards warranty will be apparent from the fact that the proclamation of sale which has to be published is in the same terms in both classes of cases. The difference in the rights acquired by purchasers in execution of decrees does not affect the question as regards warranty of title.

4. Before parting with this question, I must observe that the plaintiff does not state that the judgment-debtor had no saleable interest, the allegation being to the effect that the plaintiff purchased only the right, title and interest of the judgment-debtor and not the holding free from all encumbrances as in a rent sale. On that allegation, the question discussed does not arise and the plaintiff's suit is not maintainable on any ground whatsoever.

5. With regard to the second point the matter of fraud was not investigated by the learned Judge on appeal and the appellant asks us for a remand of the case for retrial on that ground. The learned Vakil for the respondent contends that, assuming that such a suit on the ground of fraud is maintainable, there is no such averment of fraud in the plaint by which the plaintiff was induced to purchase the property and that there is nothing to be enquired into; although the words "fraud" and "collusion" have been used several times in the plaint, if those words are struck out, the facts alleged do not disclose any fraud which would entitle the plaintiff to maintain this action nor was any issue raised on that question. Reference has been made in this connection to the case of Ganga Narain Gupta v. "Tiluckrcam Chowdhury 15 I.A. 119 : 15 C. 588 : 12 Ind. Jur. 254 : 5 Sar. P.C.J. 168 : 7 Ind. Dec.

(N.S.) 939, where Lord Watson quoted the well-known dictum of Lord Selborne on that question, The appellant urges that, although no issue was raised, the Trial Court decided the question of fraud and the defendants cannot be said to have been prejudiced or taken by surprise. The Trial Court, however, seems to have decided two points on the facts alleged in the plaint. First, that in the rent suit the defendant No. 2 who was a grandson of the recorded tenant did not represent the entire body of tenants deriving title from the recorded tenant and, secondly, that the enhanced rate of rent claimed by the landlord in his suit was not bona fide as the defendant No. 2 had no authority to agree to an enhancement on behalf of all the tenants and this enhancement was made by the landlord in collusion with the defendant No. 2. These findings can hardly be said to be findings of fraud which would entitle the auction-purchaser to have the sale set aside. I have examined the plaint and there is no allegation in it beyond those which have been found by the Munsif. It seems to me clear that these findings were not considered to be findings on any question of fraud by the parties in the lower Appellate Court as it does not appear that the lower Appellate Court was asked to come to any finding on the question of fraud. This ground also, therefore fails.

6. The appeal must, therefore, be dismissed with costs.

Rankin, J.

7. I agree.