

(1933) 02 CAL CK 0025

Calcutta High Court

Case No: Appeal from Appellate Order No. 107 of 1932

Khudiram Bhakat

APPELLANT

Vs

Shomnath Banerjee and Others

RESPONDENT

Date of Decision: Feb. 28, 1933

Final Decision: Dismissed

Judgement

Mitter, J.

This is an appeal by Defendant No. 6 and arises out of a suit brought by the several Plaintiffs in the suit for setting aside an ex parte rent decree and the sale held in execution of the said decree. The allegation of the Plaintiffs in substance is that no rent was due to the landlords at the time the rent suit in question was decreed ex parte against the tenants excepting Defendant No. 7 who made a confession of the knowledge of the judgment. It is further alleged that there was fraudulent suppression of notice on all the Defendants. It is further alleged that the sale proclamation and other processes in the execution proceeding were fraudulently suppressed; and the important part of the allegation is that judgment-debtor No. 7 purchased the property in the name of his son who is the Appellant before us in collusion with the decree-holder in the suit. The defence taken by the Defendants is that the suit is not maintainable. That defence prevailed with the Court of first instance which dismissed the suit. Against that decision an appeal had been taken to the Court of the Subordinate Judge of Birbhum who was of opinion that the suit was maintainable and has remanded the case to the Court of first instance for a trial of the suit on merits. The learned Subordinate Judge has made certain observations towards the end of his judgment at page 6 of the paper-book which it is objected to on both sides and should not have been made.

2. Against that decision of the Subordinate Judge the present appeal has been preferred by Defendant No. 6 and it is contended that, so far as Plaintiffs Nos. 2 to 6 are concerned, as the transfer in their favour was a mere right to sue which is not transferable under the provisions of sec. 6 (e) of the Transfer of Property Act, those

Plaintiffs cannot maintain the suit. The point made is that the transfer in favour of Plaintiffs Nos. 2 to 6 by Defendant No. 1 and Defendant No. 10 was made after the sale had been confirmed some time in the year 1926, it being alleged that the transfer took place in 1927 which is after the confirmation of the sale and which event must have happened at any rate after the 6th September, 1926. The Subordinate Judge in coming to the conclusion that the Plaintiffs Nos. 2 to 6 could prosecute the suit to set aside the sale relied on the decision in the case of *Monmotho Nath Dutt v. Matilal Mitra* 38 C. W. N. 614 (1923) and it is contended in view of that decision that as the right of the transferors had been extinguished by the confirmation of the sale, what was transferred was the bare right of action or a mere right to sue. It appears to us, however, that the transfer was made by a deed of 1927 of the property which forms the subject-matter of the litigation. The transfer was not of mere right to sue but of the property which is the subject-matter of the litigation. That transfer necessarily carried with it the right to sue. In support of this view we may refer to the decision which has been cited to us on behalf of the Respondents in the case of *Dickinson v. Burrell* [1866] L. R. 1 Eq. Cas 337. There from the facts recited it appears that A having executed a conveyance of real estate to B, which was liable to be set aside on equitable grounds, afterwards made a voluntary settlement of the same property in trust for himself for life, with remainder to his children as he should appoint, and in default of appointment to all his children who should attain 21, or (being daughters) should marry, in equal shares. It was held that the infant children of A could maintain a bill, making A and the trustees of the settlement Defendants, set aside the conveyance of B. With reference to the argument that such a bill was not maintainable, Lord Romilly M.R., in delivering the judgment, said this:

If James Dickinson had sold or conveyed the right to sue to set aside the indenture of December, 1860, without conveying the property, or his interest in the property, which is the subject of that indenture, that would not have enabled the grantee, A. B., to maintain this Bill; but if A. B. had bought the whole of the interest of James Dickinson in the property, then it would. The right of suit is a right incidental to the property conveyed; nor is it, in my opinion, a right which is only incidental to the property when conveyed as a whole, but it is incidental to each interest carved out of it.

3. We are of opinion, therefore, that where a transfer is made of the property which is the subject-matter of the litigation and if it appears that the transfer was one for good consideration, it cannot be said that a mere right to sue is transferred. We are of opinion, having regard to the decisions of this Court and the decisions of the Judicial Committee, that the law in India does not prevent persons from transferring the subject-matter of the suit in order to obtain the means of prosecuting it. We may refer in this connection to the decision of their Lordships of the Judicial Committee in the Privy Council case of *Bhagwat Dayal Singh v. Debi Dayal Sahu* L. R. 35 I. A. 48 : S. C. I. L. R. 35 Cal. 420 : 12 C. W. N. 893 (1908). That is exactly what has happened in

this case. We are, therefore, of opinion that the Subordinate Judge was right in coming to the conclusion that the suit is maintainable at the instance of Plaintiffs Nos. 2 to 6.

4. The next ground taken is that it is not open to the transferors from Defendant No. 10 to apply to set aside the sale as the sale had already been confirmed, having regard to the provisions of Or. 21, r. 92 of the Code of Civil Procedure. The answer to that contention is that the suit is rested on the allegation of fraud in obtaining a decree; and in such circumstances if the allegation is established, it necessarily follows that the sale falls along with it, as it is alleged that the judgment-debtor No. 7 himself has purchased the property. If on the other hand the Plaintiffs are not able to establish the allegation that the purchase of Defendant No. 7 was in the benami of his son, then the true legal position is that the sale would not be set aside even if it was tainted with fraud. If any authority is needed on the proposition, reference may be made to the case of *Chitambar Shrinivasbhat v. Krishnappa* I. L. R. 26 Bom. 543 (1902) which is cited by this Court in the decision of the case of *Paresh Nath Mallick v. Hari Charan Dey* I. L. R. 38 Cal. 622; S. C. 15 C. W. N. 875 (1911). There Sir Lawrence Jenkins, C. J., pointed out that if a sale is set aside and the decree is held to be fraudulent but the purchase is made by a third party auction-purchaser without notice of the fraud, the sale does not fall on the setting aside of the decree.

5. It appears to us that it was not necessary for the Subordinate Judge to make the observations which occur from line 10 at page 6 of the paper-book up to the word "maintainable" at the end of the same page. Both the Appellant and Respondents seem to think that the observations made there may prejudice them as the facts have not yet been investigated. We accordingly order that the portion just referred to, that is, the portion of the judgment of the learned Subordinate Judge from line 10 at page 6 of the paper-book to the end of the page, will be deleted. The rest of the judgment will stand.

6. There will be no order as to costs.

M.C. Ghose, J.

I agree.