(1912) 06 CAL CK 0059

Calcutta High Court

Case No: None

Radha Madhab Paikara		APPELLANT
	Vs	
Kalpataru Roy and Others		RESPONDENT

Date of Decision: June 18, 1912

Citation: 16 Ind. Cas. 811

Hon'ble Judges: Beachcroft, J; Ashutosh Mookerjee, J

Bench: Division Bench

Judgement

1. This is an appeal on behalf of the third defendant in a suit for declaration of title to Immovable property and for confirmation of possession thereof. The plaintiff-respondent, admittedly the original owner of the property, on the 13th March 1888, mortgaged jt to one Hari Bnllav Bose. The mortgagee enforced his security, obtained a decree and in execution thereof purchased the property on the 4th May 1897. On that date, therefore, the plaintiff ceased to be the owner of the property, but he apparently continued in possession. On the 22nd April 1898, the mortgagee auction-purchaser executed a conveyance in respect of the property in favour of the first defendant. The case for the plaintiff is that this transfer was made for his benefit but that the conveyance was taken in the name of the first defendant because he himself was in debt and was anxious to keep his property from the reach of his creditors. On the 25th March 1899, Jhe first defendant executed a mortgage of plaintiff property in favour of the second defendant. The mortgagee sued to enforce his security and obtained a decree. At the execution sale which followed, the third defendant became the purchaser on the 15th December 1906 for a sum of Rs. 7,150. On the 15th March 1907, the plaintiff commenced this action for declaration that the third defendant had acquired no title by his purchase, that he himself, was the owner under the conveyance executed in favour of the first defendant on the 22nd April 1898, that the mortgage by that defendant to the second defendant was fraudulent and without consideration and that the decree, in execution whereof the property was subsequently sold, was collusive. The Courts below have decreed the suit. They have found concurrently that the transfer by Hari

Bullav Bose in favour of the first defendant on the 22nd April 1898 was for the benefit of the plaintiff, that the plaintiff thereafter continued in possession as before, and that the conveyance also was in his custody. They have further held that no money was advanced by the second defendant to the first defendant on the footing of the mortgage of the 25th March 1899, that the transaction in substance, was fictitious and that the suit subsequently brought by the mortgagee to enforce his security was also collusive. Under these circumstances, the Courts below have held that the third defendant has acquired no title to the property by his purchase at the execution sale, they have also found, though in vague and general terms, that the purchase by the third defendant was fraudulent, but the allegation of the plaintiff that the first three defendants bad conspired to defraud him, has not been specifically established. The third defendant has now appealed to this Court and has contended that he has acquired a valid title to the property by his purchase at the execution sale, and that, at any rate, the plaintiff is not entitled to succeed till the appellant has been re-paid the sum deposited by him in Court after his purchase at the execution sale. In our opinion, the facts found by the District Judge are not sufficient for the disposal of the suit and do not support the decree which has been made in favour of the plaintiff.

2. It is clear at the outset, that as no consideration was paid by the second defendant to the first defendant on the basis of the mortgage of the 25th March 1899, the mortgage transaction must be regarded as collusive. On the basis of this mortgage, a fictitious suit was brought by the mortgagee against the mortgagor; there was no contest and a decree was made in favour of the mortgagee. Under these circumstances, the result of the suit may be described in the language used by Lord Brougham in Earl of Bandan v. Henry Becker 3 Cl. & F. 479 : 9 Bligh (N.S) 532 In order to make, a sentence there must be a Veal interest, real argument, real prosecution, real, defence and a real decision; of all these requisites, not one takes place in the case of a fraudulent and collusive suit; there is no Judge but a person invested with the insignia of a judicial office who is mis-employed in listening to a fictitious cause proposed to him; there is no party litigating, there is no parly defendant and no real interest brought into question." See also the observations in Gore v. Stacpoole 1 Dow. App. Cas. 18 at p. 30 : 14 R.R. 1. We must take it then that, in so far as the plaintiff was concerned, prima facie, he would not be affected by the collusive decree in the fictitious suit of the second defendant against the first defendant, and he would be entitled, when the fraud was discovered, to have it declared that his rights had not been affected by the fraudulent decree. No doubt, as was stated in Robert Cole Bowen v. John Evans 2 H.L. Cas. 257 although fraud is not to be assumed in doubtful evidence, yet if it is clearly proved, no lapse of time would protect the parties to it or those who claim through them, against the jurisdiction of a Court of Equity, and in that case, it is immaterial by what machinery or contrivance the fraudulent transaction may have been effected, whether by a decree in equity, or a judgment at law, or otherwise See also Colyer v. Finch 5 H.L.C.

905 : 26 L.J. Ch. 65 : 3 Jur (N.S.) 25. It does not follow, however, that if, in execution of such a decree, the property has passed into the hands of an innocent purchaser, who pays value for the property, the plaintiff is necessarily in a position to enforce his rights as against him.

3. This is clear from the decision of their Lordships of the Judicial Committee in Lalla Bunseedhur v. Koonwar Bindeseree Dutt Singh 10 M.I.A. 454 and of this Court in Mohesh Chunder Bagchee v. Bwarkanath Moitro 24 W.R. 260. We are not unmindful that it has been laid down, in cases where an execution sale has been vitiated by fraud committed in the course of the execution proceedings themselves as in Hungsha Majillya v. Tincowri Das 8 C.W.N. 230 and Ambika Prasad Singh v. Whitwell 6 C.L.J. 111 that it is not necessary to establish fraud on the part of the auction-purchaser. But where execution proceedings have been conducted, apparently with regularity and in conformity with law, and the only defect alleged is that the decree on which the execution proceedings are founded was fraudulent, an innocent purchaser would be protected and it would be necessary to establish that he was a party to the fraud or was apprised thereof before he paid his money. Bishun Chand v. Bijoy Singh 13 C.L.J. 588 : 11 Ind. Cas. 399 : 15 C.W.N. 648 : 8 A.L.J. 587 : 13 Bom. L.R. 440 : (1911) 2 M.W.N. 418 : 21 M.L.J. 652 : 10 M.L.T. 335.

4. We have, therefore, to determine in the present case, whether the third defendant who purchased at the execution sale, was an innocent purchaser for value without notice of the fraud which vitiated the suit of the mortgagee and the decree obtained therein. The Courts below have stated in general terms that his conduct was fraudulent and it has been urged before us that that finding is binding upon this Court in second appeal. But, as was observed by Baron Parke in Murray v. Mann 2 Ex. 538 : 76 R.R. 686 : 17 L.J. Ex. 256 : 12 Jur. 634 although it is the" duty of the Jury to determine the facts upon which the allegation of fraud is based, whether the facts so found justified the inference of fraud, is a question of law for the Court to determine. We have thus to consider whether the facts found by the Courts below justify the inference which has been drawn from them. The Court of first instance, which dealt with this matter more fully than the Court of Appeal below, observed that the third defendant and the second and the fourth defendants were relations; the third defendant owns a village contiguous to the tenure in suit, he must have been aware of or could have easily known the particulars of the tenure he was purchasing but he says he made no inquiries and purchased in a hurry; in other words, he acted in a way in which a man of ordinary prudence would not have acted; he must, therefore, have purchased in collusion with the other defendants. These facts, even if they are assumed to be established, do not, in our opinion, justify the inference that the third defendant was aware of the fraud which vitiated the decree in the mortgage suit, It has been argued, however, on behalf of the respondents'' that as the title-deed was in the custody of the plaintiff and as he retained possession of the property, if the third defendant had made any inquiry, he would at once have been apprised of the fraud. Reliance has been placed upon the theory

principle that it is the duty of a purchaser to call for the title-deeds and it is also his duty to inquiry into the possession of the property. Now, it may be conceded that whatever puts a party on inquiry amounts in law to notice, provided the inquiry becomes a duty and would lead to a knowledge of the facts by the exercise of ordinary intelligence and understanding. Wherever the facts put a party on inquiry, constructive notice will be imputed to him, if he designedly abstains from inquiring for the purpose of avoiding notice. But where a party could not have learnt the facts by inquiry, he is not prejudiced because he did not inquire. If the third defendant had been a private purchaser from the first defendant or the second defendant, the omission to call for the title-deeds would have unquestionably fixed him with constructive notice of the title of the plaintiff. This position has not been disputed on behalf of the appellant and is supported by the cases of Oliver v. Hinton (1899) 2 Ch. 264 : 68 L.J. Ch. 583 : 48 D.R. 3 : 81 L.T. 212 : 15 T.L.R. 450; Berwick and Company v. Price (1905) 1 Ch. 632 : 74 L.J. Ch. 249 : 92 L.T. 110 and Agra Bank v. Barry 7 H.L. 135 at p. 157. It need not also be disputed that if the third defendant had been a private purchaser, he might be expected, a* a reasonable man, to make inquiries about the condition of the property. Allen v. Seckham 11 Ch. D. 790 : 48 L.J. Ch. 611 : 41 L.T. 260. 28 W.R. 26. For instance, if a person is in possession, it may be sufficient to put one, dealinsr with the property, on inquiry as to the nature ande xtent of his interest. Barnhart v. Greensl Mds 9 Moore 18 P.C. ; Manchrajee Sorabji Chulla v. Kongseoo 6 B.H.C.R.O.C. 59; Hakeern Meah v. Beejoy Patnee 22 W.R.S.; Jugul Kissore v. Karhic 21 C. 116; Bhikhi Bai v. Udit Narain Singh 25 A. 366 at p. 370 : A.W.N. (1903) 81; Kondiba v. Nana 27 B. 48 : 5 Bom. L.R. 269. This principle however does not apply to the case of the third defendant, who is a purchaser at a sale in execution. Such a purchaser acquires the right, title and interest of the judgment-debtor, and, he can acquire, it is true, only such title by his purchase at the sale in execation of the mortgage decree as might have been conveyed to him by the mortgagor and the mortgagee. That title, as we have already held, is fictitious, and, therefore, as pointed out by the Judicial Committee in Munshi Karimuddin v. Kunwar Oobind Krishni Narain 36 I.A. 138 : 13 C.W.N. 1117 : 11 Bom. L.R. 911 : 6 A.L.J. 807 : 6 M.L.T. 275 : 10 C.L.J. 243 : 31 A. 497 : 3 Ind. Cas. 795 : 19 M.L.J. 687 prima facie he has acquired no title by his purchase ; but the question still remains, whether he has not acquired a good title by estoppel against the plaintiff. What inquiries could he have made before his purchase? If he had inquired in the Registration Office, he would have found that the conveyance from. Hariballabh Bose ''stood in the name of the first defendant, the mortgagor. He would have farther found that many years before the execution sale, the first defendant had dealt with the property as his own and had executed a mortgage in favour of the second defendant, on the footing whereof a decree had been made by a Court of Justice. He could not have called upon either the mortgagor or the mortgagee to produce the title-deeds for inspection and examination; if he had made such a request, neither of them would have been under any obligation to produce the title-deeds. Nor could he be blamed for his omission to inquire, whether the mortgagee or the mortgagor was in actual

occupation of the property, because it is conceivable that even a person who is out of possession may execute a mortgage of his property and may transfer a valid title to the mortgages and ultimately to the execution purchaser. The principle, Jaid down by Sir Richard Couch in Hakeem Meah v. Bejoy Patnee 22 W.R.S. that if a person is in possession, it may be sufficient to put one, dealing with that property, on inquiry as.to the nature and extent of his interest, cannot consequently be applied to the case before us. On the other hand, the third defendant can claim the benefit of the doctrine that where one of two innocent parties must suffer from the fraud of a third, the loss should fall on him who enabled such third party to commit the fraud. D. McLaren Morrison v. Versohoyle 6 C.W.N. 429 at p. 445; Juggernath Augur walla v. Swith 33 C. 547 at p. 557. The root of the trouble in which the plaintiff now finds himself is his fraudulent design to keep his property from the reach of his creditors; whether he has accomplished the fraud, we do not know; but if the fraud has been carried out, no Court will assist him Sidlingappa v. Hirasa 31 B. 405 : 9 Bom. L.R. 542; on the other hand, if it has not been carried out, though, as laid down in Jadu Nuth Foddar v. Buplal Poddar 33 C. 967 : 4 C.L.J. 22 10 C.W.N. 650 and Petherpermal Chetty v. Servai Muniandy 35 I.A. 98 :35 C. 551 : 8 C.L.J. 528 : 12 C.W.N. 562 : 5 A.L.J. 290 : 7 C.L.J. 528 : 14 Bur. L.R. 18 : 10 Bom. L.R. 590 : 18 M.L.J. 277 : 4 M.L.T. 12 : 4 L.B.R. 266 his conduct does not disentitle him to protection from the Court, he may find that he has been successfully overreached by the ostensible owner whom he deliberately set up. The position, therefore, is that if the third defendant can establish that, without notice of the fraud, he in good faith paid his money for the purchase of the disputed property at the execution sale on the 15th December 1906, the plaintiff has no enforceable title as against him. This part of the case, however, has not been properly investigated. It has been suggested on behalf of the plaintiff-respondent that the money put into Court was not the money of the third defendant, that the three defendants conspired to cheat him, and that to carry out this scheme, money was paid into Court by one of the three defendants and subsequently taken out by the others, so that ultimately the third defendant has not been prejudiced by the fictitious deposit. The burden thus rests upon the third defendant to prove that he is a lona fide purchaser for value without notice.

5. The result is that this appeal is allowed the decree of the District Judge set Zide and the case remanded to him in order that he may determine, whether the sum de posited by the third defendant as par-chaser at the execution sale was his money and whether he made the deposit without knowledge of the fraud committed by the mortgagor and the mortgagee in the mortgage suit If this question is answered in favour of he third defendant, the suit will stand dismissed with costs If or the other hand, the question is answered against the third defendant, the suit will be decreed with costs. The District Judge will be at liberty to take additional evidence, if we thinks it necessary to do so for the ends of justice; such evidence may be taken either by himself or by the Subordinate Judge under his direction. We may add that the third defendant has stated this Court that even if it be ultimately found that he is

a bona fide purcheser for value without notice and is, therefore, under the decree entitled to retain the property he is prepared to surrender it to the plaintiff upon receipt of the sum deposited by him with interest at the rate of six per cent per annum. The costs of this appeal will abide by the result.