

(1873) 03 CAL CK 0006

Calcutta High Court

Case No: Regular Appeal No. 189

Bissessur Lall Sahoo
and Another

APPELLANT

Vs

Ramtuhul Singh and
Others

RESPONDENT

Date of Decision: March 21, 1873

Final Decision: Allowed

Judgement

Sir Richard Couch, Kt., C.J.

The case of Sowdamini Chowdrain v. Krishna Kishor Poddar 4 B.L.R., F.B., 11 is different from the present, and the decision there does not, I think, apply to it. There the plaintiff had lost the property which he had bought in consequence of its being found that the judgment-debtor had no title whatever to it, a third person having recovered it by showing that he was the person lawfully entitled to it. In the present case, the loss to the plaintiffs was caused, not by the judgment-debtor having no title to the property, but by his asserting his title, and by virtue of his getting the sale set aside. He has obtained a decree of this Court by which he has recovered the property, and if the plaintiffs do not succeed in the present suit, he will not only keep it, but will get debts to the amount of Rs. 8,000, for which his property was liable to be attached and sold, paid with the plaintiffs' money. I think the rule that ought to be applied in this case is that which is applied by Courts of Equity, where sales are set aside on account of fraud, or for other reasons which are held by the Court to vitiate the sale. Lord Cottenham, in Bellamy v. Sabine 2 Phillips, 425, see 442, says as to such cases:--"The Court proceeds upon the ground that as the transaction ought never to have taken place, so the rights of the parties are, as far as possible, to be placed in the situation in which they would have stood if there had never been any such transaction." That rule is applied by him in the case quoted to the setting aside a conveyance on account of fraud and ordering a reconveyance. If in such a case the purchaser is to have back his purchase-money, it is equitable that he should in the present case. The rule is also applied where an annuity is set aside on account of a defect in the memorial; an account is taken, and the defendant, the purchaser of the

annuity, is allowed his principal and interest and costs. The remarks of the Subordinate Judge in regard to the nature of this purchase by the plaintiff, might, in many cases, be applied to the purchase of an annuity, frequently a very speculative transaction. There is also another instance which may be mentioned, in the case of *Belcher v. Vardon* 2 Collyer, 162, see 175, where securities were set aside on account of usury at the instance of the assignees of a bankrupt. In that case, the defendant had leave to prove his advances with legal interest.

2. I am of opinion that the rule ought to be applied in the present case, and that the plaintiffs are entitled to be restored to the position in which they would have been if the sale for the Government revenue had not taken place. It is a mistake to apply to a case like the present the rule stated in Addison on Contracts as to voluntary payments. The payment here was not voluntary; it was made on account of the purchase, and is not to be regarded as a voluntary payment. It is true that the plaintiffs were not parties to the sale and purchase which was set aside. They bought the interest in the surplus, but the consequence of the judgment-debtor succeeding in setting aside the Government sale was to obliterate the surplus and prevent the plaintiffs from getting any part from it. I think the proper course would have been to have made the present plaintiffs parties to the suit for setting aside the Government sale, if the purchase by the plaintiff was confirmed before the hearing of the suit, as they had an interest in the sale not being set aside, and would be affected by the result. It does not appear when the suit for setting aside the sale was heard. If they had been parties to that suit, the Court, in making the decree setting aside the sale, ought, and, it must be presumed, would have directed that it should be set aside upon the plaintiff therein paying to the present plaintiffs the money which they had paid. Lord Cottenham says in the passage which follows the one I have quoted:--"In setting aside sales of this kind, the Court considers the purchaser as in the situation of a mortgagee, so far as he has made payments in consequence of the sale." On that ground, therefore, I think the plaintiffs are entitled to succeed in the present suit, and to recover what they have claimed for the principal money and interest.

3. In consequence of an appeal being now pending in the Privy Council, it is necessary to declare that, should it be successful and the decree of this Court be reversed, and the sale for arrears of revenue stand good, the present plaintiffs are not to have any rights whatever in consequence of it. By bringing this suit, they elect to consider the sale as set aside, and to have back their purchase-money. Having made their election and treated the sale as set aside, they cannot take advantage of any decision that may be made by the Privy Council reversing that. They must abide by what they now ask for, and the sale, so far as they are concerned, must be treated as finally set aside.

4. Then the next question to be considered is in regard to the costs. The plaintiffs have shown that they are entitled to succeed in the suit, and the person who is liable to pay the money is the first defendant, Ramtuhul Singh, and he ought to pay the plaintiffs' costs of the suit.

5. As to the second defendant, the representative of Sheo Pershad Singh, he attached the surplus in the hands of the Collector, which he had the right to do, but then he ought to have ascertained whether, instead of putting up to sale the share of the surplus, which seems to have amounted to more than Rs. 35,000, he could not have obtained an order to have the amount which was due to him, Rs. 4,970-9-3■, paid to him. His conduct appears to be such that he ought not to receive his costs, but ought to be made to pay them himself.

6. As to the third, fourth, fifth, and sixth defendants, namely the other decree-holders who were paid out of what remained of the purchase-money paid by the plaintiffs after satisfying Sheo Pershad Singh, they do not appear deserving of any blame. They received their money from the Court out of what remained after satisfying the attaching creditor, and they ought not to have been made parties to the suit. The plaintiffs must therefore pay their costs. There will be a decree accordingly, and the plaintiffs will recover from the first defendant the amount claimed with costs.