

Babaji Krishna Chandra Das Vs. Dasarathi Das and ors.

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Court : Orissa

Decided On : Mar-24-1950

Reported in : AIR1951Ori149

Judge : Panigrahi, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 21, Rule 90; Limitation Act, 1908 - Sections 18

Appeal No. : Civil Revn. No. 251 of 1949

Appellant : Babaji Krishna Chandra Das

Respondent : Dasarathi Das and ors.

Advocate for Def. : J. Kar and ;D. Mohanty, Advs.

Advocate for Pet/Ap. : B.K. Pal, Adv.

Disposition : Revision dismissed

Judgement :

ORDER

Panigrahi, J.

1. The petitioner is the transferee from the auction-purchaser at a rent sale held, on 15-7-43 of lands measuring 2.8 acres in holding No. 402 in Mouza Gopalpur.

The petitioner purchased the property from the auction-purchaser on 17-5-46 and tools delivery through Court on 19-11-46. The judgment-debtor opposite party filed an application under Order 21, Rule 90, Civil P. C, read with Schedule 8, Limitation Act, for setting aside the sale. This application was made on 13-12-46. The Deputy Collector who had seizing of the case found that there were several irregularities in the service of the sale proclamation and attachment order; that the sale notice was not properly proclaimed; and that the sale proclamation and attachment order were not served in the presence of either the president or the Tahsil punchayat. In his opinion these irregularities 'kept the door wide open for fraud in this respect' and his ultimate finding is that there were gross irregularities in serving processes. Having regard to the fact that the suit property measured over 2 1/2 acres and had been knocked down at the sale for a sum of Rs. 30/- and that the transferee purchased it later from the auction-purchaser for Rs. 200/-, the Trial Court was justified in holding that in order to secure the suit lands for a low price, the decree-holder:

'fraudulently maneuvered with regard to the service of the necessary sale proclamation and attachment notices'.

The Trial Court has further observed that he would have set aside the sale if the application had been filed within 30 days of the sale. The decree had been passed 'ex-parte' and so far as the judgment-debtor's knowledge is concerned, none of the execution notices appears to have been served upon him. In view of his finding that there were irregularities in the service of processes and that the sale-price was very low, the Trial Court was justified in inferring that the decree-holder (who was the sole bidder at the auction sale) was himself responsible for maneuvering the sale and that he was guilty of fraud.

2. The Trial Court, however, refused to set aside the sale as, in his view, the decree-holder was not responsible for the ignorance of the judgment-debtor with regard to the attachment and he was not actively responsible for any act which might have kept the judgment-debtor out of knowledge. The Appellate Court held that in view of the finding with regard to the conduct of the sale it was upon the decree-holder to prove that the judgment-debtor knew of the sale. It is urged in

revision that this view of the appellate court is erroneous, and. Mr. Pal appearing for the transferee from the auction-purchaser rightly points out the distinction between fraud arising from irregularities in the conduct of the sale and fraud as contemplated under Schedule 8, Limitation Act. Section 18 says that if a person had been kept from his knowledge of the rights by means of fraud limitation will run from the date of knowledge. The question therefore is: is there any material on the record to impute any act to the decree-holder which would amount to keeping the judgment-debtor from the necessary knowledge? It appears to me that the fraud envisaged in Schedule 8, Limitation Act, contemplates some definite act committed by the decree-holder. But it may well be that a concealment of facts which would otherwise amount to notice or bring the said to the Knowledge of the judgment-debtor would equally be an act of fraud. If, for instance, the decree-holder takes steps not only to see that the requisite notices do not reach the judgment-debtor but also to see that the sale is made to take place in circumstances which do not attract sufficient number of bidders, so that the property may fetch a reasonable price, then I would be inclined to hold that there had been a concealment of facts or circumstances amounting to fraud, which has kept the judgment-debtor out of the knowledge of his right. Where a person gets property by committing fraud of this sort, it is for him to show that the person injured by his act and suing to recover the property, has had clear and definite knowledge of those facts which constitute fraud at a time which, is too remote to allow him to bring the suit. This was the dictum of Lord Hobhouse in (*Rahimbhoy v. Turner*), 17 Bom 341: 20 I.A 1 (PC) The true position then is, as Mookerji J points out in (*Biman Chandra v. Promothonath Ghose*), 49 Cal 886 at p. 891: (AIR (9) 1922 Cal 157), that where a suit is, on the face of it, barred, it is for the plaintiff to prove, in the first instance, the circumstances which would prevent the statute from having its ordinary effect. A person, who, in such circumstances, desires to invoke the aid of Schedule 8, Limitation Act, must establish that there had been fraud and that by means of such fraud he has been kept from his knowledge of his right to sue or of the title whereon it is founded. Once this is established, the burden is shifted on to the other side to show that the plaintiff had knowledge of the transaction beyond the period of limitation. In cases where the property has changed hands on account of any act committed by the party accused of fraud, or

if there be circumstances which would reasonably lead to the inference that the opposite party had been deprived of knowledge, the Courts are more astute in applying the test. In a recent case, brought to my notice, reported in (Marudanayagam v. Manickavasagam), 49 OWN 292: (AIR (32) 1945 P. C. 67) - the Privy Council laid down, that where a sale takes place at a serious under-valuation occasioned by failure on the part of the Court and of the decree-holder to carry out the obligations laid down under the Civil Procedure Code, the case falls within the language of Order 21, Rule 90 and the sale must be set aside when the judgment-debtor has suffered injury thereby, although the decree-holder may not have been guilty of fraud, and however dilatory the judgment debtor may have been provided there has been nothing on his part to constitute a waiver. Applying this rule of law to the facts of the case before me, I find that there have been gross irregularities in the service of processes, that the judgment-debtor did not know of the existence of the decree against him or of the subsequent stages of the execution, though there is no reliable evidence to attribute any specific act to the decree-holder, designed to keep the judgment-debtor from knowledge of the proceedings. Even in such a case, if the price fetched at the sale is a gross under-valuation, this must be attributed to the irregularity in the service of the notices. In such cases, the decree-holder cannot escape the charge of fraud, nor can the judgment-debtor be deprived of the benefit of the provisions of Schedule 8, Limitation, Act.

3. The sale has, therefore, to be set aside as the judgment-debtor has suffered injury on account of the circumstances created by the decree-holder in irregularly publishing and conducting the sale. I am satisfied that the order of the lower appellate court in this case is correct, though his reasoning is somewhat defective. I see no reason to interfere in revision. This revision is dismissed.