

Amirennessa and ors. Vs. Ananda Chandra Saha and ors.

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Court : Kolkata

Decided On : Dec-07-1934

Reported in : AIR1935Cal356,159Ind.Cas.299

Appellant : Amirennessa and ors.

Respondent : Ananda Chandra Saha and ors.

Judgement :

Nasim Ali, J.

1. The appellants who are the plaintiffs prayed the Court (1) for a declaration that a decree obtained by the principal defendants against the plaintiff's and the pro forma defendant 12 in Rent Suit No. 1194 of 1919 on 23rd June 1919 was obtained by fraud and was liable to be set aside (2) for a declaration that the sale which was held in execution of the said decree and at which the defendants purchased the plaint lands belonging to the plaintiffs was fraudulently effected, and (3) for confirmation of plaintiffs' possession of the said lands.

2. The trial Court held that the decree was obtained by fraudulent suppression of summons and the auction sale was also fraudulent as the sale processes were suppressed. The trial Court further held that the sale was void as no notice under Order 21, Rule 22, Civil P.C., was served on the judgment-debtors. The trial Court was also of opinion that the suit was maintainable under law and was not barred by limitation. In the result it decreed the plaintiffs' suit. On appeal by defendants 1

to 5 to the lower appellate Court the learned Judge came to the conclusion that the decree was not obtained by suppression of summons. The learned Judge however agreed with the trial Court in finding that the sale processes were suppressed. The learned Judge was further of opinion that notice under Order 21, Rule 22 was not necessary. The learned Judge however held that the suit was barred by limitation. He accordingly allowed the appeal and dismissed the plaintiffs' suit. In the present appeal the only point argued by the learned advocate for the appellants is that the learned Judge was in error in holding that the suit was barred by limitation. Now in view of the finding of the Judge that the decree was not obtained by fraud, the decree is not liable to be set aside and consequently the plaintiffs' prayer for setting aside the decree must be disallowed. The question of limitation therefore arises only in connexion with the prayer for setting aside the sale.

3. It has been found by the learned Judge that there was a previous execution of the decree in the year 1921. It further appears that the last order in that execution case against the judgment-debtors, i.e., the plaintiffs in this suit was on 25th December 1921 and the execution in which the sale in question was held was started within one year from that date. It is therefore clear that the sale cannot be challenged as void on the ground of want of notice under Order 21, Rule 22, Civil P.C. The position therefore is that the sale is not void but voidable. The plaintiffs are therefore bound to get the sale set aside before they can have their title to the lands sold declared and their possession therein confirmed. The next point for decision therefore is whether plaintiffs are entitled to bring a separate suit for setting aside the sale. It has been already pointed out that the sale is not bad for want of notice under Order 21, Rule 22, Civil P.C. The finding of the learned Judge is that the sale processes were fraudulently suppressed. In other words the sale is liable to be set aside as there was fraud in publishing the sale. The grounds for setting aside the sale in the present suit therefore are within the scope of Order 21, Rule 90, Civil P.C. 92 of the said order lays down:

(1) Where no application is made under Rule 89, Rule 90 or Rule 91, or where such application is made and disallowed, the Court shall make an order confirming the sale and thereupon the sale shall become absolute (2) Where such application is made and allowed, and where, in the case of an application under Rule 89, the

deposit required by that rule is made within thirty days from the date of sale, the Court shall make an order setting aside the sale. Provided that no order shall be made unless notice of the application has been given to all persons affected thereby. (3) No suit to set aside an order made under this rule shall be brought by any person against whom such order is made.

4. Under Cl: (3) of Rule 92 no suit will lie to set aside an order confirming the sale under Clause (1) even if no application under Rule 90 is made. My conclusion therefore is that In view of the grounds taken by the plaintiffs in the present suit for attacking the sale, their proper remedy was by an application under Order 21, Rule 90, Civil P. C, and not by a separate suit. The following observations of Sulaiman, J., in this connexion in the case of *Mt. Inder Koer v, Sah Dharam Narayan*, 1930 All 556 are pertinent:

It is quite clear that it is not open to the plaintiffs to get the auction sales set aside by this suit on the ground of any fraud in the conduct and proclamation of the sale. For that the remedy was under Order 21, only and no separate suit lies.

5. The learned advocate for the appellants however contended that this suit might be treated as an application under Order 21, Rule 90. Assuming that such a course is permissible the real difficulty in the way of the appellants is that in that case there would be no second appeal and further the application would be barred by limitation as the appellants came to know of the sale at least on 28th March 1928 and the present suit was filed on 18th June 1928. In the above view of the matter it is not necessary to decide the question whether a suit for setting aside a sale on the ground of fraud is governed by Article 12, or Article 95, Lim. Act. In the result the appeal fails and is dismissed. But in the circumstances of the case I make no order as to costs.