

ALLAHABAD HIGH COURT

Mani Lal

Vs.

Ganga Prasad

Second Appeal No. 1159 of 1944

(Agarwala and P.L. Bhargava, JJ.)

14.09.1950

JUDGMENT

Agarwala, J.

1. This appeal arises out of restitution proceedings under Section 144, Civil Procedure Code. A preliminary decree for rendition of accounts and dissolution of partnership was passed in favour of Durga Prasad against two persons, Mani Lal and Shyam Sunder Lal. Mani Lal was held not liable to render accounts, while Shyam Sunder Lal was held liable to render accounts. Both Shyam Sunder Lal and Mani Lal appealed against this decree. Their appeals were dismissed. A final decree was then passed against Shyam Sunder Lal. Before the decree was passed Durga Prasad had applied for attachment of two houses belonging to Mani Lal. An order of injunction was issued against Mani Lal not to sell his share in the houses. But in spite of the order he sold his share in the houses to one Hazari Lal. The sale was, however, a fictitious sale. Against the dismissal of his appeal against the preliminary decree Shyam Sunder Lal filed a second appeal in this Court. This appeal was dismissed but not without making certain modifications in the preliminary decree. On account of these modifications, a fresh final decree had to be prepared, the original final decree was set aside, and a fresh final decree was passed against both these defendants, Mani Lal and Shyam Sunder Lal for Rs. 2284-2-11. Against his decree Mani Lal appealed. The appeal was allowed and he was exempted from the decree altogether. During the pendency of the appeal, however, both the houses were sold and were purchased ostensibly by one Ram Das who stated at the time of the sale that he had purchased the half share belonging to Shyam Sunder Lal for the decree holder Durga Prasad and the other half belonging to Mani Lal for one Ganga Prasad. The sale was then confirmed before Mani Lal's appeal was allowed. There was a second appeal by Durga Prasad but this was dismissed. Then Mani Lal applied for restitution by setting aside of the sale held during the pendency of the appeal. The Civil Judge allowed the application. Ganga Prasad appealed to the lower appellate Court. This appeal was allowed and the restitution application rejected. Mani Lal has now come in second appeal to this

Court.

2. One proceeding has not yet been mentioned. It will be remembered that during the pendency of the suit in the first Court, Mani Lal had sold his half share to one Hazari Lal. Mani Lal's case was that this sale was a fictitious sale. Hazari Lal died and on his death his son Ram Prakash filed a suit for declaration that he was the owner of the half shares which have been sold to Hazari Lal. To this suit Durga Prasad and Ganga Ram were also parties. The suit was, however, dismissed upon the finding that the sale was fictitious. An appeal and second appeal were also dismissed.

3. Before the lower appellate Court two questions were urged. It was argued that the sale in favour of Hazari Lal was not a fictitious sale and that the decision in the suit brought by Ram Prakash was not binding upon Ganga Prasad because Ganga Prasad was no party to the suit. The lower appellate Court gave effect to this plea and held that since Mani Lal had transferred his interest to Hazari Lal, he had no locus standi to apply for restitution. But the judgment passed in the suit is on the record, and it shows that Ganga Prasad was a party to the suit. Mr. Shabd Saran on behalf of the appellant has also filed a copy of the decree passed in that suit and this also clearly shows that Ganga Prasad was a party to the suit. The lower Court's decision, therefore, cannot be sustained on this ground. If this were decisive of the second appeal we would have, allowed the second appeal. But Mr. Jagdish Swarup, on behalf of the respondent, has contended that the lower appellate Court's view on the second point urged before it is erroneous. The second point urged before the lower appellate Court was that Ganga Prasad being a bona fide purchaser, the sale in his favour could not be set aside, even though the decree in execution of which the sale was held was set aside in appeal. The lower appellate Court's view was that the provisions of Section 144, Civil Procedure Code, were enough to cover the case of a bona fide stranger purchaser also and that once a decree in which the sale was held was set aside, the sale automatically fell to the ground and the auction-purchaser, whether stranger or decree-holder, must surrender the property to the judgment debtor, and for this proposition it relied upon the Privy Council decision reported in *Jai Berham v Kedarnath Marwari*¹,

4. It is true that Section 144, Civil Procedure Code, gives effect to the principle enunciated by Lord Cairns in the case of *Rodger v. The Comptoir D'Escompte De Paris*²,

"One of the first and the highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors. And when the expression 'the act of the Court' is used, it does not mean merely the act of the primary Court or of any intermediate Court of appeal, but the act of the Court as a whole, from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case. It is the duty of the aggregate of those tribunals, if I may use the expression, to take care that no act of the Court in the course of the whole of the proceedings does an injury to the suitors in the Court."

But this equitable principle is subject to another principle equally well settled.

5. In Bacon's Abridgement, it was laid down, citing still older authorities, that:

"If a man recovers damages and hath executed by fieri facias and upon the fieri facias the sheriff sells to a stranger a term for years, and after the judgment is reversed the party shall be restored only to the money for which the term was sold, and not to the term itself, because the sheriff had sold it by the command in the

¹ AIR 1922 PC 269

²(1871) 7 Moo. P. C. (N. s.) 314
writ of fieri facias."

This principle was upheld in England in numerous cases vide Mathew Manning's case. (1609) 8 Co. Rep. 94b, *Bennet v. Hamill*³ The principle was applied by the Privy Council to Indian cases in *Zain-ul-Abdin Khan v. Muhammad Asghar Ali Khan*⁴, The Privy Council after quoting from Bacon's Abridgement observed that bona fide purchasers who were no parties to the decree had nothing to do further than to look to the decree and to the order of sale. Their Lordships pointed out the distinction between a case in which the decree holder was the auction-purchaser, who was not protected when the decree was set aside or modified, and the case of a stranger auction-purchaser. If the stranger auction-purchaser was a bona fide purchaser, he was entitled to be protected. This decision of the Privy Council has been followed in several cases in India, vide *Piari Lal v. Hanif-un-nissa Bibi*⁵, *Balwant Singh v. Mt. Laiqa Begam*⁶,

6. The Privy Council case, *Jai Behram v. Kedar Nath*⁷, is distinguishable. In that case an execution sale of immovable property, and the sale certificate following upon it, were set aside in appeal. In the present case the sale has not been set aside in appeal at all.

7. It has been urged on behalf of the appellant that Ganga Prasad knew of the pendency of the appeal which had been filed by Mani Lal against the final decree and as such, he could not be held to be a bona fide purchaser. The lower appellate Court has distinctly found that Ganga Prasad was not a benamidar for the decree-holder and that he was a purchaser in his own right. The mere fact that he knew that Mani Lal had filed an appeal against the decree in which the sale was held would not affect the bona fide nature of his purchase. If that were so, the result would be that in all cases in which an appeal was filed it would be difficult to hold a sale in execution of the decree which was the subject-matter of the appeal It is laid down in Order 41, Rule 5 (1), Civil Procedure Code, that:

"An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree."

If the mere fact that a decree was under appeal were to affect the sale, the result would be that

there would be practically an automatic stay of the sale proceedings and no purchaser would purchase the property held under a sale in such circumstances or at any rate would not be prepared to pay the full price of the property.

8. Learned counsel for the appellant relies upon a decision of the Judicial Commissioner in *Jamnmal Gurdinomal v. Gopaldas*⁸, In that case it was found that the auction-purchaser knew that at the time of the purchase an appeal was pending and in the appellate Court the appellant had given the auction-purchaser an express opportunity to defend his title under the sale, but that the auction-purchaser had declined to do so. On these facts, it was held that the purchaser was not a bona fide one. The facts of that case are clearly distinguishable from the facts of the present case. No such

³(1806) 2 Sch. and Lef. 566 at p. 577, Bowen v. Evans, (1844) 1 Jo. and Lat. 178 at p. 259

⁴10 ALL. 166

⁶ AIR 1924 All 273

⁸ AIR 1924 Sind 101

⁵38 ALL. 240

⁷ AIR 1922 PC 269 : 2 Pat. 10

opportunity as was given in that case to the auction purchaser to defend his title was given in the present case to Ganga Prasad. In our opinion, Ganga Prasad being a bona fide purchaser is not affected by the reversal of the decree in the appeal of Mani Lal.

9. The result, therefore, is that this appeal fails and is dismissed with costs.

Appeal dismissed.