

CALCUTTA HIGH COURT

Mina Kumari Bibee

Vs

Jagat Sattani Bibee

(Richard Garth, Kt., C.J. Macpherson, J.)

06.09.1883

JUDGMENT

Richard Garth, Kt., C.J.

1. We think that the Court below was quite right.
2. It is not necessary for us to deal with any other than that which is the principal question in the case, namely, whether the sale, which took place under the execution proceedings in the former suit, can be set aside by the plaintiff in this suit.
3. She (the present plaintiff) was the judgment-debtor in the former suit, and before the execution issued under which the sale took place, she took the objection that the right to issue execution was barred by limitation.
4. The Court held that execution was not barred, and consequently the sale took place, and was confirmed to the present defendant.
5. The plaintiff, the execution-debtor, then appealed to the High Court. The High Court held that the Court below was wrong, and that the right to issue execution was barred. The decision has been since approved by the Privy Council.
6. The plaintiff then brought this suit for the purpose of having it declared that the sale was invalid.
7. The Court below has given the plaintiff a decree to the effect, but it has been contended before us in appeal that, although under the circumstances the plaintiff may be entitled to have the purchase-money paid to her, she is not entitled to set aside the sale; and in support of that contention we are referred to a case decided by Sir Barnes Peacock and the late *Mr. Justice Mittr-Jan Ali v. Jan Ali Chowdhry*¹.

8. In that case a sale had taken place under a decree at the time when the decree was valid, and the decree-holder had a perfect right to issue execution under it. But the decree was subsequently reversed on appeal, and it was then contended that the sale itself, which had been made to a bond fide purchaser for value, could not stand.. But the Court there held that, as when the sale took place, the decree was good and the execution proceedings were perfectly regular, the sales could not afterwards be set aside as against a bond fide purchaser for value.

9. That case is distinguishable from the present upon two grounds.

10. In the first place an objection was raised in this case in due time that the right to issue execution was barred; and as it was afterwards held in appeal that the objection was a valid one, it follows that the sale took place under circumstances which showed that it was illegal.

11. But in the next place there is this very material difference between the two cases. In this case it cannot be said that the sale was made to a bond fide purchaser for value without notice ; because the execution-creditor was himself the purchaser. He was perfectly aware of the objection which had been taken, and he also knew that, if that objection were valid, the execution would be contrary to law. Notwithstanding this, he insisted on pressing on the sale, and was himself the purchaser. He, therefore, bought with full notice that his title might turn out to be invalid, and we think he must take the consequences of his imprudence.

12. We find that in the case referred to in the lower Court's judgment, *Mahomed Hossein v. Kokil Singh*² we carefully abstained from giving any opinion as to whether under circumstances somewhat similar to the present, the judgment-debtor could have set aside the sale by means of a regular suit.

13. That question has now arisen, and we think it only just that the sale should be set aside. It seems to us that if after the objection had been properly taken, the judgment-debtor could not set aside the sale as against the execution-creditor, the appeal to the High Court, though successful, would virtually be infructuous.

14. It is perfectly true that the execution-purchaser had a right, if he chose, to insist upon the sale taking place; but if he adopted that course, he did so at the risk of the sale being set aside.

Cases Referred.

11 B.L.R. A.C. 56 : 10 W.R. 154
21.L.R. 7 Cal. 91