

# CALCUTTA HIGH COURT

Set Umedmal

Vs

Srinath Ray

(Francis W Maclean K.C.I.E C.J. Banerjee, J.)

21.03.1900

## JUDGMENT

**Francis W. Maclean, K.C.I.E., C.J.**

1. This is an appeal by the representatives of the judgment-debtors against the decision of the Subordinate Judge of the 24-Pergunnahs, dated the 17th of April 1899, refusing to set aside the sale of certain property which had been sold under a decree, and which was purchased by the respondents, who were themselves the decree-holders, but who had liberty to bid.

2. The facts may be shortly stated. The decree for sale was dated the 13th of February 1896, and was made in a suit to enforce an equitable mortgage. The property in due course of execution was ultimately sold, and, as I have already said, the decree-holders became the auction-purchasers. The sale was confirmed on the 22nd of February 1897. On the 8th of September 1898, the decree was at the instance of some of the defendants set aside under Section 108 of the Code of Civil Procedure. On the 22nd of February 1899, the present application was made by the representatives of the judgment-debtor and the learned Subordinate Judge refused to set aside the sale. I may add, though in my opinion it does not affect the matter for present purposes, that on the 16th of December 1899, the same decree was again made in the presence of all the parties.

3. Upon this state of facts two questions have been argued, first that the case does not fall within the provisions of Section 244 of the Code of Civil Procedure, and that the present appellant ought to have instituted a separate and independent suit to set aside the sale, and, secondly, that as the sale has been confirmed, it cannot now be set aside. Upon the first question the tendency of the decisions in this Court, a tendency which has met with the approval of the Judicial Committee of the Privy Council, is to place a wide and liberal construction on Section 244 of the Code, and not to drive the parties to an independent suit, unless the case be clearly outside the scope and purview of the section. In support of this view I may refer to the cases of *Doyamoyi Dasi v. Sarat Chunder Mozoomdar*<sup>1</sup> *Maharani Beni Prosad Koeri v. Lakhi Rai*<sup>2</sup> and to *Durga Charan Mandal*

*v. Kali Prasanno Sarkar* <sup>3</sup>These cases appear to me to establish that the case falls within Section 244 of the Code, as I consider it does.

4. As regards the second point, viz., whether, notwithstanding the confirmation, the sale ought to be set aside, the fact that the decree-holder is himself the auction-purchaser is an element of considerable importance. The distinction between the case of the decree-holder and of a third party being the auction purchaser is pointed out by their Lordships of the Judicial Committee in the case of *Nawab Zainal-ab-din Khan v. Mahommed Asghar Ali*<sup>4</sup> and also in the case of *Mina Kumari Bibee v. Jagat Sattani Bibee*<sup>5</sup> which is a clear authority for the proposition that where the decree-holder is himself the auction-purchaser, the sale cannot stand, if the decree be subsequently set aside. I am not aware that this decision, which was given in 1883, has since been impugned.

5. I ought perhaps to refer to the case of *Gowree Boyjo v. Jodha Singh* (1873) 19 W.R., 416, as some reliance was placed upon it by the learned vakil for the respondent, It is sufficient to say that the circumstances of that case were very different from those of the present, and that it cannot be regarded as an authority against setting the sale aside.

6. I have now dealt with the points which have been urged before us, and for the reasons I have stated, I consider the view taken by the Court below cannot be supported, and that the appeal must be allowed with costs.

**Banerjee, J.**

7. I am of the same opinion.

Cases Referred.

1(1897) I.L.R., 25 Cal, 175

2(1898) 3 C.W.N., 6

3(1899) I.L.R., 26 Cal, 727

4(1887) L.R., 15 I.A., 12 (15): I.L.R., 10 All., 166

5(1883) I.L.R., 10 Cal., 220