

# CALCUTTA HIGH COURT

Abdul Rahaman

Vs.

Sarafat Ali

(A Mookerjee and N Chatterjea, JJ.)

24.08.1915

## JUDGMENT

### A Mookerjee

1. We are invited in this appeal to consider whether a sale of the properties of the appellant in execution of an ex parte mortgage-decree, should stand confirmed. The sale was held on the 2nd November 1911 and was confirmed on the 13th December following. The decree-holder, who had himself become the purchaser, forthwith transferred the property to another person. On the 19th August 1912, the judgment-debtor applied to have the sale set aside; he alleged that the sale had been irregularly and fraudulently held and had caused him substantial injury. He joined as opposite parties to his application, both the decree-holder auction-purchaser and the assignee from him. At the same time, he instituted proceedings to have the ex. parte decree itself set aside. On the 22nd February 1913, the application to set aside the ex parte decree was granted. Thus, on the 28th July 1913, when the Munsif took up for disposal, the application to set aside the sale, he found that the ex parte decree had already been set aside. He consequently held that the sale must be set aside on the authority of the decision in *Set Vmedmal v. Srinath Ray*<sup>1</sup> although in the interval, the decree-holder auction-purchaser had transferred the property to a stranger. In this view, he declined to take evidence as regards the merits of the case and set aside the sale without enquiry into the allegations of fraud, irregularity and substantial injury. On appeal by the assignee from the decree-holder auction-purchaser, the District Judge has reversed this order and has directed that the sale do stand good. He has held that the assignee from the decree-holder stands on a better footing than his assignor and is entitled to retain the property, notwithstanding the cancellation of the ex parte decree which was the foundation for the sale. The judgment-debtor has now appealed to this Court and has invited us to hold that the sale stood cancelled as soon as the ex parte decree was set aside and that it was immaterial that the property had meanwhile been assigned away by the decree-holder auction-purchaser. We are of opinion that this contention is well-founded and must prevail. In the first place, it is clear that the primary Court was competent to set aside the sale on a ground which was not mentioned, in the application of the judgment-debtor and did not in fact exist when that application was made. It is well settled that the Court

may, in order to shorten litigation or to do complete justice between the parties, take notice of events which have happened since the institution of the proceedings and may afford relief to the parties on the basis of the altered conditions. The decisions which recognize this principle, are reviewed in *Rai*

<sup>127</sup> C. 810 : 4 C.W.N. 692

*Charan Mnndal v. Biswanath Mandal*<sup>2</sup> and reference may be made particularly to *Hazari Mal v. Janahi Prasad*<sup>3</sup> and *Ramyad Sahu v. Bindeswari Kumar Upadhay*<sup>4</sup>

2. In the second place, it is clear that the effect of the cancellation of the ex parte decree on the execution sale held thereunder is not touched by the fact that the decree-holder auction-purchaser has assigned away the property sold. As fully explained by Jenkins, C.J., in *Satis Chandra Ghose v. Rameswari Dasi*<sup>5</sup> the assignee stands in no better position than his assignor. This is borne out by the decision of the Judicial Committee in *Zain-ul-Abdin Khan v. Muhammad Asghar Ali Khan*<sup>6</sup> and it is plain that the contrary view adopted in *Sheik Ismal Rowther v. Rajab Rowther*<sup>7</sup> is supported neither by principle nor by authority. The theory whereby a special protection is afforded to a stranger who purchases at an execution sale, will be found expounded in the case of *Krishna Chandra Mandal v. Jogendra Narain Roy*<sup>8</sup> that rule cannot be extended to an assignee of the decree-holder auction-purchaser.

3. We are informed that on re-trial of the suit a decree has been made in favour of the plaintiff against the defendant; but as Maclean, C.J., pointed out in *Set Umedmal v. Srinath Ray*<sup>9</sup> that does not affect the question of the effect of the cancellation of the ex parte decree upon the sale held thereunder; as soon as the ex parte decree was set aside, the sale fell through, and the fresh decree subsequently made, could not possibly validate that sale. On this ground, the present case is distinguishable from the decisions in *Hazari Mal v. Janaki Prasad*<sup>10</sup> and *Ramyad Sahu v. Bindeswari Kumar Upadhya*<sup>11</sup> where the very decree which was the basis of the sale, though temporarily nullified, was ultimately maintained.

4. The result is that this appeal is allowed, the order of the District Judge set aside and that of the Court of first instance restored. Each party will pay his own costs throughout the proceedings.

<sup>2</sup>26 Ind. Cas. 410 : 20 C.L.J. 107

<sup>4</sup>6 C.L.J. 102

<sup>6</sup>15 I.A. 12 : 10 A. 166 : 5 Sar. P.C.J. 129

<sup>3</sup>6 C.L.J. 92

<sup>5</sup>31 Ind. Cas. 894 : 22 C.L.J. 409

<sup>7</sup>830 M. 295 : 17 M.L.J. 165 : 2 M.L.T. 186

<sup>9</sup>27 C. 810 : 4 C.W.N. 692 <sup>11</sup>6 C.L.J. 102

<sup>8</sup>27 Ind. Cas. 139 : 20 C.L.J. 469 : 19 C.W.N. 537

<sup>10</sup>6 C.L.J. 92