PATNA HIGH COURT

Bishunath Tewari

Vs

Mirchi

A.F.A.D. No. 1988-A of 1948

(Ramaswami, J. Lakshmikanta Jha, C.J. and Reuben, J.)

06.05.1952

JUDGMENT

Lakshmikant Jha, C.J.

1. This appeal arises out of a suit for redemption of a usufructuary mortgage and for possession with masne profits. Both the courts below have decreed the suit; hence this second appeal by the defendants.

2. The plaintiff executed a registered usufructuary mortgage bond dated 11-7-1932, for a sum of Rs.122/- in favour of one Harihar Tewari, since deceased, ancestor of the defendants mortgaging 3.83 acres of raiyati land, and put the mortgagee in possession thereof, in lieu of interest, from the beginning of Asarh, 1339 Fasli (June, 1932). Under the terms of the mortgage bond, the mortgagee stipulated that

> "the payment of rent to the malik in respect of the said rehan property is the concern of the said rehander"

and in the description of the property at the foot of the mortgage bond it was stated that the annual rent including cesses was Rs.19/12/3 (Ext.A.).

3. While the mortgagee was in possession, the landlords brought two suits for arrears of rent in respect of the mortgaged land and put up the holding to sale in execution of the decree, but the entire decretal amounts were deposited by the mortgagee (vide chalans Exts.B to B2) and the sales were averted.

4. According to the defendants, the landlords instituted the two rent suits, claiming rent at an enhanced jama of Rs.23/7/3 and the mortgagee (Harihar) deposited the landlords' dues under the two decrees in order to protect his own interest. It is alleged that the plaintiff was asked to reimburse the defendants; and on her refusal to do so, the sons of Harihar (two of whom are defendants 1 and 2) instituted a money suit against the plaintiff and her son in 1941 for recovery of the excess amount and an 'ex parte' money decree (Ext.E) was obtained, and as the decree was

not satisfied the mortgaged land was sold in execution of the money decree and auction-purchased by the sons of Harihar themselves.
The plaintiff however, brought the suit for redemption, pure and simple, without any prayer for setting aside the court sale. Her allegation is that the money payable under the mortgage bond in suit was offered to the defendants, and on their refusal it was deposited in court and a notice was duly served on them, but in spite of the notice they did not give up possession. She has, therefore, claimed recovery of possession with mesne profits on redemption.

5. The defendants have resisted the suit and their case is that the plaintiff's right of redemption has been extinguished by reason of the sale of the land in suit held in execution of the money decree obtained by them. According to them, the plaintiff is not entitled to claim either redemption or recovery of possession or mesne profits because the court sale in execution of the money decree stands unreversed and there is no averment in the plaint that the court sale is vitiated by any fraud.

6. The decrees for rent alleged to have been obtained by the landlords have not been filed. The chalans (Exts.B to B2), the sale certificate (Ext.O) and the writ of delivery of possession (Ext.D) filed by the defendants show that the jama of the holding, inclusive of cess, was only Rs.19-12-3. The learned Subordinate Judge has, on a consideration of the entire evidence, oral and documentary, held in agreement with the trial court, that the plaintiff had no knowledge either of the suits instituted by the landlords or of the money suit instituted by the mortgagee. His finding is that under the mortgage bond Harihar was bound to pay the rent himself, that by making the deposit of the decretal dues of the landlords, the mortgagee discharged his own liability, and that the claim of the defendants to be reimbursed was dishonest. He has accordingly held that the decree and sale was fraudulent.

7. The sale of the mortgaged land in dispute was held by a court of competent jurisdiction, but on the finding of the court of appeal below, as also of the court of first instance, the decree and the sale held thereunder, which stand unreversed, were vitiated by the fraud of the mortgagee, and the plaintiff had no knowledge of the money suit or of the court sale. The point for decision is whether the plaintiff can treat the sale as a nullity on the ground of the fraud of the mortgagee and seek redemption of the mortgage without getting the sale set aside. The contention of Mr. P.R. Das, for the appellants, is that the money decree or the court sale not having been set aside within three years of the date of the plaintiff's knowledge of the fraud under Article 95 Limitation Act, the plea of nullity is not available to the plaintiff and the court of appeal below had no jurisdiction to decide the question of fraud and record its finding thereon. He has accordingly urged that the finding of fraud must be ignored and the suit for redemption dismissed. Mr. Das has raised interesting questions of law but, on authorities, his contentions must, in my opinion, fail.

8. The allegation of the plaintiff in paragraph 9 of her plaint is that on 15-1-1946, the defendants "expressed" to have purchased the land in dispute at an auction sale in connection with some money decree, and in paragraph 10 of her plaint she puts her case thus:

> "No kind of decree was, by any means, passed against the plaintiff, nor has the plaintiff got knowledge of any decree, nor was any summons or notice etc. or writ of attachment

> or sale proclamation or writ of delivery of possession served. If the defendants have taken any kind of proceeding after winning over the maliks and the peon of the court of which the plaintiff has no knowledge, the plaintiff is not and cannot at all be bound by the same."

Though no specific issue was raised on the question of fraud, the parties were allowed to lead evidence on the question and the courts below recorded their finding of fraud under issue No.3 which related to "res judicata". The contention of the defendants' counsel in the court of first instance was that unless fraud in obtaining the decree is established and unless the decree is set aside it will have its binding effect. The learned Munsif repelled this contention and held:

> "So far as the establishment of fraud is concerned, the plaintiff has clearly alleged it in para 10 of her plaint and has also alleged in the dock that no summons or notice or any processes of execution proceedings were served upon her and she had no knowledge of the suit."

The court of appeal below affirmed this finding and held that the defendants managed to get the decree by practising fraud on the court and on the mortgagor. But the learned Subordinate Judge, while recording this finding, remarked that there was no allegation of fraud in the plaint. On a reference to paragraph 10 of the plaint, already quoted, it is clear that, though the word "fraud" has not been used in the plaint in connection with the money decree or the sale held thereunder, yet all the material facts constituting fraud were stated. It has been pointed out on more occasions than one that pleadings in India are not to be strictly and literally construed. In - *'Gopi Narain Khanna v. Babu Bansidhar[1]',* their Lordships of the Judicial Committee pointed out that if the plaint contains a statement of all the material circumstances, but the prayer is inartistically framed, the court can give appropriate relief if the plaintiff is otherwise entitled to it. I am, therefore, inclined to the view that the court of appeal below was not right in its remarks that the plaintiff had not alleged fraud in the plaint. As on the concurrent finding of the courts below the decree and sale were vitiated by fraud, the plaintiff is entitled to redeem if her right is not barred by any express provision of the law. It has been contended that by reason of Order 21 Rule 92, clause (3), Civil Procedure Code the plaintiff is not entitled to seek redemption unless the sale is set aside. There is, in my view, no force in this contention. Order 21, R.92 Clause (1), provides:

> "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."

And Clause (3) provides:

> "No suit to set aside an order made under this rule shall be brought by any person against whom such order is made."

It is thus clear that the sale must stand if the case be governed by any of the rules mentioned in Order 21 Rule 92, clause (1).

9. The case before us cannot fall either under Rule 89 or R.91. The bar of the Rule can be

attracted only if the case falls under Rule 90. In my view, the provisions of R.90 also cannot apply because the sale is not challenged on the ground of material irregularity or fraud in publishing or conducting the sale. It is sought to be attacked on the ground of fraud in snatching a decree from the court and proceeding with the execution of it with which the sub-rule has no concern. According to both the courts below, there was no basis for the claim, firstly because the liability for the payment of rent was on the mortgagee, and secondly because the defendants failed to prove that the rent claimed by the landlords in the suits for arrears of rent was claimed at Rs.23-7-3. The whole of the proceedings in execution, therefore, spring from a fraudulent decree pronounced, according to the findings of the courts below, by the fraud of the mortgagees. The decree thus obtained, therefore, can avail nothing for the defendants or against the plaintiff; and as the whole proceeding is fraudulent, there is nothing real either in the money decree or the sale held thereunder. The plaintiff can, therefore, treat the sale as a nullity and claim right of redemption. In - *'Shivlal Bhagvan v. Shambhu Prasad Parvatishankar'*[2], it was held that a sale held in execution of a decree which was later on modified in appeal cannot be attacked; but in that case Sir Lawrence Jenkins observed:

> "The effect of the reversal of a decree on a sale held under it was considered by the House of Lords in - *'Tommey v. White*[3]*',* (C). Lord Brougham in delivering his opinion said:
> "We cannot set aside the sale, for the sale was under the decree of the Court, to a 'bona fide' purchaser, there being no fraud, and consequently the setting aside that sale is utterly and absolutely out of the question; the sale must stand."

Thus the Full Bench in this case recognized the principle that a sale to a 'bona fide' purchaser can be set aside if vitiated by fraud.

10. The decision of the English Courts regarding the effect of fraud are not uniform. In some cases, it has been held that a decree obtained by one of the parties to a previous suit cannot be challenged on the ground of fraud so long as it remains unreversed. Willes, C.J. made a distinction between the case of a stranger and the case of one who is a party to the proceedings. According to him, a stranger who cannot come in and reverse the judgment must of necessity be permitted to aver that it is fraudulent; but if one who is a party to the proceedings pleads that the judgment was fraudulent, he cannot give evidence of it but must apply to the Court which pronounced the sentence to vacate the judgment (Vide - *'Prudham v. Phillips*[4]*',* In - *'Huffer v. Allen*[5]*',* it was held that, while a judgment stands, it stops the plaintiff from denying the correctness of the judgment or of the execution. The facts of that case were shortly these: The plaintiff was indebted to the defendants in the sum of £28. The defendants commenced an action against the plaintiff in the Queen's Bench for the recovery of the debt by a writ specially endorsed and personally served. The plaintiff, before appearance and before judgment, paid to the defendants, and the defendants accepted, the sum of £10 on account of the debt, but the defendants, after
such payment, signed judgment for default of appearance for the full amount of the debt of £ 28, and costs and sought to realise the full amount under the decree by the arrest of the plaintiff. The plaintiff was arrested and was compelled, in order to procure his discharge, to pay the full amount endorsed and the Sherrif's fees. The plaintiff averred that the defendants wrongfully and maliciously and without reasonable or probable cause realised the amount in excess of the amount for which he was liable. He accordingly sued for damages in respect of the £10, the extra

fees and costs and the detention. Kelly, C.B. observed that

> "while the judgment stands it cannot be contradicted, it is always open to the Court on motion to correct its judgment, to relieve any party who may be unduly prejudiced by any act done under its order, and to prevent any injurious consequences which may flow from its error".

In the same case Bramwell, B. observed:

> "The plaintiff cannot attack any of their proceedings unless he can attack the judgment, and this he clearly cannot do."

And in this view of the law the action was dismissed.

11. A contrary view, however, was taken in - *'Bandon v. Becher'*[6], (F). It was held in that case that if the proceeding of a court be vitiated by fraud it must be treated as a nullity and of no avail even against a party to the proceedings. In 'Bandon's case, sales of estates had fraudulently taken place under decrees of the Court of Exchequer in Ireland, obtained by collusion between the tenant for life, the mortgagee, the person in whose favour a charge had been created, and the purchaser, and the interests of the tenant in remainder had not been protected. The Court of Chancery in Ireland, on the tenant in remainder coming into possession, granted him relief on a bill filed to redeem. The House of Lords in affirming the decision of the Court of Chancery in Ireland held as follows:

> "It is said that the whole of these proceedings spring from a decree of the Court of Exchequer in Ireland, and that that decree being pronounced by a Court of competent jurisdiction, upon parties legally before it, cannot now be questioned in another Court of co-ordinate jurisdiction; but, if brought into dispute at all, should be brought into dispute in the Court where it was originally pronounced.

I agree generally to the proposition, but I must add to it this one qualification, that you may at all times, in a Court of competent jurisdiction, -competent as to the subject-matter of the suit itself- where you appear as an actor, object to a decree made in another Court, upon Which decree your adversary relies; and you may, either as actor or defender, object to the validity of that decree, provided it was pronounced through fraud, contrivance, or covin of any description, or not in a real suit; or if pronounced in a real and substantial suit, between parties who were really not in contest with each other. That it is undeniably true that the Court of Chancery has no right to review a
decree of the Court of Exchequer; that nothing but a Court of Appeal can give redress if such decree is erroneous, is clear, and indeed nothing can be more true than such a proposition, but it is equally true, that if the decree has been obtained by fraud it shall avail nothing for or against the parties affected by it, to the prosecution of a claim, or to the defense of a right. These two propositions are undeniably true; they are recognized in practice, they are independent of each other, and they stand well together. That was the rule stated as deduced from all the authorities in a case which, having been decided in the Court of Arches, was subsequently the subject of

discussion in another court. The question was whether the judgment of the Court of Arches was conclusive and binding on all other Courts, not Courts where that judgment was before them on appeal. Mr. Solicitor General Wedderburn, in his excellent argument in that case, thus summed up the effect of all the authorities: ‘A sentence is a judicial determination of a cause agitated between real parties, upon which a real interest has been settled; in order to make a sentence there must be a real interest, a real argument, a real prosecution, a real defense, a real decision. Of all these requisites not one takes place in the case of a fraudulent and collusive suit; there is no Judge, but a person invested with the ensigns of a judicial office, is misemployed in listening to a fictitious cause proposed to him; there is no party litigating, there is no party defendant, no real interest brought into question.' On the whole, I am of opinion that this case falls within the rule there stated and which I quote from Mr. Wedderburn's statement because of the aptness of the expressions. It is not an irregularity, it is not an error which is here complained of, but it is that the whole proceeding is collusive and fraudulent, that it cannot therefore be treated as a judicial proceeding; but may be passed by as availing nothing to the party who sets it up."

12. But whatever may be the legal position of a party in England if a judgment or sentence be vitiated by his fraud, the law on the point is clear in India and well settled on authorities. It is true that so long as judgment, decree or order of a court of competent jurisdiction stands, it cannot be made the subject of a direct attack. Therefore, if a party to the proceeding in which it was obtained proceeds to enforce it in execution, the adverse party affected by it cannot challenge its legality on the ground of fraud or collusion. But it is the substantive right of every person affected by a judgment, decree or order of a court of competent jurisdiction to institute a suit for its avoidance on the ground of fraud or collusion within the time prescribed by the statute of limitation, and if the suit succeeds, the direct effect of it is avoided. But the law does not require a judgment, decree or order to be set aside or reversed for a collateral attack on the ground of fraud, for Section 44, Evidence Act provides:

> "Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under Section 40, 41 or 42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion."

13. Section 40 relates to 'res judicata', Section 41 to judgments 'in rem' and Section 42 to judgments, orders or decree relating to matters of a public nature. Sections 41 and 42, therefore, have no application to the present case. But the application of Section 40 is attracted because the decree (Ext.E) on which the whole execution proceeding is founded and which was pleaded in bar as 'res judicata' under issue No.3 is vitiated by the fraud of the mortgagee. The decree is, therefore, a nullity for the purpose of a collateral attack, and anything flowing from such a decree, must also be treated as nullity. The plaintiff can, therefore, ignore the sale and the effect of the decree on the ground of fraud. The language of Section 44 is wide enough to allow a party to show the true nature of a decree or order which is pleaded in bar, notwithstanding the fact that the decree or order has not been avoided. As the court of appeal below, in agreement with the trial court, has found that the decree and sale were fraudulent, they can be ignored and treated as a nullity, for Lord Walsingham in the - 'Duchess of Kingston's case (1776) 1 Leach 146 (PA), observed: "Fraud is an extrinsic, collateral act, which vitiates the most solemn proceedings of Courts of Justice. Lord Coke says, it avoids all judicial acts, ecclesiastical or temporal". (Smith's

Leading Cases, 13th Edn. Vol.2, page 651). It is pertinent to refer here to the observation of Latham, J. in - *'Ahmedbhoy Hubibhoy v. Volleebhoy Cassumbhoy[7]'* , which is as follows:

> "This section (Section 44 of the Evidence Act) clearly covers the present case; the difficulty is to say that it does not cover. Its language is wide enough to allow a party to the suit in which the judgment was obtained to aver that it was obtained by the fraud of his antagonist, though the judgment stands unreversed".

In - *'Manchharam v. Kalidas,[8]'* it was held that under Section 44, Evidence Act, a party to a proceeding is never disabled from showing that a judgment or order has been obtained by the adverse party by fraud. In - *'Nistarini Dassi v. Nundo Lall Bose[9]',* Stanley, J. sitting on the Original side of the Calcutta High Court, held that an innocent party may be allowed to prove in one court that a decree obtained against him in a different proceeding in another Court of concurrent jurisdiction was obtained by fraud, and if the Court be of opinion that such decree so obtained in the other Court cannot stand it has jurisdiction to treat that decree as a nullity and render its effect nugatory. He observed (at p.918-19):

> "I am of opinion that a decree so obtained cannot stand, and that this court has jurisdiction if not to set it aside at least to treat it as a nullity and render its effect nugatory."

In - *'Rajib Panda v. Lakhan Sendh Mahapatra'[10],* Maclean, C.J. and Banerjee, J. held that under Section 44, Evidence Act the defendant could show that the decree was obtained by fraud. The view taken in '27 Cal 11', was followed in the case of - *'Prayag Kumari Debi v. Siva Prosad Singh[11]',* and Chatterjee J. held that a party to a suit can show that a decree obtained by opposite party against him in another suit was obtained by fraud, and it is not necessary for him to bring an independent suit for setting it aside. The Allahabad view is also on line with the view taken by the Calcutta High Court. In - *'Bansi Lal v. Dhapo[12]',* it was held that if a subsisting judgment, order or decree, which is relevant under Sections 40, 41, or 42 of the Evidence Act, is set up by one party to a suit as a bar to the claim of the other party, it is not necessary for the party against whom such judgment, order or decree is set up
to bring a separate suit to have the same set aside.It may be stated that Sir John Stanley, as the Chief Justice of the Allahabad High Court, reiterated the view taken by him in '26 Cal 891'. The same view was taken by Sulaiman C.J. in - *'Mt. Parbati v. Gajraj Singh[13]',* Dawson Miller, C.J. in - *'Hare Krishna v. Umesh Chandra[14]',* in repelling the argument based on 'res judicata', observed:

> "It is nevertheless open to the plaintiff to reply in answer to this plea that the settlement record was obtained by fraud and if this can be proved there can be no question of res judicata. If the settlement record was in fact obtained by a fraud practised upon the settlement court there was in the eye of the law no settlement record at all upon the matter in question and it can be treated as nullity. Section 44, Evidence Act specially provides for such a case and it is not necessary that the appellant should first institute a separate suit to set aside the record on the ground of fraud".

Thus, a survey of the authorities of the different High Courts, shows that a judgment, decree or

order of a court of competent jurisdiction can be treated as a nullity under Section 44, Evidence Act and its effect rendered nugatory if it is shown that it was obtained by fraud or collusion of the antagonist. It may be observed that the language of Section 44 is wide enough to allow a party to set up even his own fraud to defeat the effect of a judicial order. In this connection I may refer to the observation of Latham, J. in '6 Bom 703, at p.716, which runs as follows : "It is also wide enough to allow a party to set up his own fraud or collusion in procuring the former judgment in order to defeat it, certainly a startling proposition". But Banerjee, J. in '27 Cal 11', did not think it to be so. He summed up his view thus:

> "Then it was contended for the plaintiffs that if Section 44 was construed literally it might allow a party to impeach a judgment on the ground of his own fraud. That, however, is an objection which will hold good equally against the plaintiffs' construction of the section. For if a party is not to be allowed to impeach a judgment on the ground of his own fraud he ought to be precluded from doing so quite as much when he seeks to establish such fraud in the case in which the judgment is used as evidence, as when he brings a separate suit for the purpose. If a party is precluded from doing so he is precluded, not by any rule of evidence, but by the general principles of justice which prohibit a person to plead his own fraud."

It is, however, not necessary for me to decide this question in the present case because the plaintiff has shown the fraud of the mortgagee, and not her own to defeat the effect of the sale.

14. The word 'fraud' has not been defined in the Evidence Act. According to Story, fraud includes all acts, omissions and concealments, which involve a breach of legal or equitable duty, trust or confidence justly reposed and are injurious to another (Vide Story, Section 187). In the case of - *'Biswambhar Biswas v. Nilambar Muhari*[15]*',* it was held that

> "two elements are necessary to constitute fraud; deceit, that is to say, some one is deceived, and injury or loss to the same person".

In the case before us, the plaintiff has proved deceit as well as injury arising from fraudulent concealments of legal proceedings by the mortgagee. In paying the decretal amount, the mortgagee discharged his own contractual obligation, and if it be held that the plaintiff has lost her right of redemption, the defendants must be held to take advantage of their own fraud to defeat the suit. Therefore, the plaintiff's right of redemption cannot be lost by reason of the sale because there was "no Judge, but a person invested with the ensigns of a judicial office was misemployed" in conducting the sale. The courts below have, therefore, rightly treated the sale as a nullity.

15. In the suit before us, as already stated, the sons of Harihar purchased the mortgaged land in execution of their money decree and the sale stands unreversed. The contention of Mr. Das is that the sale being in contravention of Order 34 Rule 14, Civil Procedure Code, is an irregular sale liable to be set aside merely on proof that the terms of that rule have been contravened; and as the sale stands, the plaintiff cannot successfully maintain a suit for redemption of the property without first getting the sale set aside. He has strongly relied upon - *'Uttam Chandra Daw v.*

Rajkrishna Dalai[16]*',* and several other cases. It may be observed that in 'Uttam Chandra's case, it was found that no fraud in sale was proved, but in the instant case the finding is that the sale is vitiated by fraud. Therefore, irrespective of the question whether the sale was for the payment of money in satisfaction of a claim arising under the mortgage or not, the principle enunciated by the Full Bench in 'Uttam Chandra's case, cannot apply. The plaintiff is, therefore, entitled to redeem.
16. The appeal is accordingly dismissed with costs.

Reuben, J.

17. (2-4-1952):- I regret that I find myself unable to agree with my Lord the Chief Justice.

18. The problem stated simply is this. A fraudulent decree was obtained by Harihar Tewari against the plaintiff respondent in a competent Court. The decree has not been set aside. It has been executed against the plaintiff in a Court which was competent to execute it and the plaintiff's interest in the suit property has been sold. The sale has not been set aside. Can the plaintiff, on the ground that the decree was fraudulent ignore the sale and redeem the mortgage?

19. The fact that the decree of a competent Court is tainted with fraud does not make it a nullity - *'Pazlul-uddin Mohammad v. Khetra Ghorai*[17]*',* If it is put in execution the Court cannot refuse to execute it on that ground - *'Bishwa Nath Prosad v. Bhagwandin*[18]*',* and a sale in execution of such a decree is a valid sale (- *'Raj Kumar Sarkel v. Rajkumar Mali*[19]*',*). The decree is however voidable and, within the time limited by Article 95, Limitation Act, the judgment debtor can sue to set aside the
decree and the sale in execution thereof ('AIR 1926 Calcutta 167'; -*'Moti Lal v. Russick Chandra'*[20]*,* (T); - *'Nath Singh v. Jodha Singh'*[21]*,* - *'Madho Saran v. Manna Lal*[22]*',*). Order 21, R.92, Civil Procedure Code will not be an obstacle to such a suit, as the fraud alleged is not an objection which comes within the provisions of any of the Rules 89, or 91 of Order 21 of the Code ('26 Cal 328 Foot Note 3 (T)). In the case before us the time limited by Article 95 has expired.

20. Section 44, Evidence Act, permits a Judgment, order or decree to be challenged collaterally on the ground that it was obtained by fraud. This provision does not make a fraudulent judgment, order or decree a nullity for all purposes. The power to challenge it is limited to cases in which the judgment, decree or order is relevant under Section 40 or 41 or 42 of the Act. Section 40 permits the use in evidence of a judgment, order or decree the existence of which prevents a Court from taking cognizance of a suit or holding a trial when the question is whether the Court should take cognizance of such suit or hold such trial. This section provides the means by which a plea of 'res judicata' on the Civil Side or 'autrefois acquit' or 'autrefois convict' on the criminal side may be proved. Where a matter has once been decided between the parties the Court cannot try it again between them but Section 44 permits such a trial where it is alleged that the former judgment, decree or order was obtained by fraud It is under this provision that the party aggrieved by a fraudulent decree can sue to get it set aside. This must be done within the time limited by Article 95, Limitation Act. If it is not, the decree becomes final against the unsuccessful party and he is bound by it to the full extent of the subject-matter of that suit or case. But if the same question arises later, between the same parties in connection with another subject-matter, and the plea of 'res judicata' is taken based on this judgment, decree or order,

Section 44 will permit it to be challenged on the ground of fraud. Section 41 permits the use in evidence of what are known as judgments 'in rem', that is to say, judgments which are conclusive not only against the parties to them but also against strangers. Section 42 relates to the use of judgments, orders and decrees relating to matters of a public nature. Here also the judgments, orders and decrees can be used against strangers, but they are not conclusive proof of what they state.

21. Sections 41 and 42 have no relevance to, the present case. Does Section 40 apply? With respect, I would answer the question in the negative. The point at issue is whether the mortgagor's reversionary interest in the suit property is still vested in the plaintiff. The defendants deny it and in support of their denial tender in evidence the sale certificate (Ex.C) and the writ of delivery of possession (Ex.D) to show that the interest claimed by the plaintiff has been sold in execution and has been purchased by them. There is no attempt here to prevent the Court from taking cognizance of the suit. The defendants merely give evidence to satisfy the Court that the plaintiff has not got the interest she claims and therefore is not entitled to redeem the mortgage. The judgment in favour of Harihar Tewari in the money suit has not been put in evidence. The decree is Exhibit E. This is not for supporting a plea of 'res judicata' but to explain how the property came to be sold in execution. It is admissible for this purpose under Section 43, Evidence Act and therefore does not attract the application of Section 44 of the Act. The certificate of sale granted under Order 21 Rule 94, Civil

Procedure Code, which is all that is necessary to prove the execution sale, is not a
judgment, order or decree within the meaning of Section 44. This is another reason why I think Section 44, does not apply. The order of the executing Court under Order 21 Rule 92 making the sale absolute is not an exhibit. Even if it had been put in evidence, it would not in my opinion come within the mischief of Section 44, for that section permits the judgment, order or decree to be attacked on the ground that "it (the judgment, decree or order) was obtained by fraud". Under Order 21 Rule 92 the order cannot be challenged on the ground that it was obtained by fraud (-*'Satish Chandra v. Makbelali Talukdar*[23]*',* (W)) and the challenge in this case is on the ground that the decree, in execution of which the sale was held, was obtained by fraud. This is a third reason why Section 44 has no application.

22. I consider that Section 44 has no application,, and that the plaintiff cannot challenge the validity of the execution sale either on the ground of fraud in the execution, proceeding or on the ground of fraud in obtaining the decree.

23. I would therefore allow the appeal, set aside the decree and dismiss the suit. In the circumstances of the case I would direct that the parties bear their own costs.

Ramaswami, J.

24. (6-5-1952):- The question involved in this appeal is whether the plaintiff should be granted a decree for redemption of a usufructuary mortgage bond with respect to 3.83 acres of land of Khata No.53 of village Sikaria.

25. The plaintiff executed the usufructuary mortgage bond on 11-7-1932, for a sum of Rs.122 in favor of Harihar Tewari, ancestor of the defendants. According to the covenants in the mortgage

bond the mortgagee was liable to pay annual rent of Rs.19/12/3 inclusive of cess to the landlord. It is alleged that the landlords instituted two rent suits claiming rent at an enhanced rate of Rs.23/7/3 and that Harihar, the mortgagee, deposited the decretal amount. Thereafter defendants 1 and 2, sons of Harihar, instituted a money suit against the plaintiff for the excess rent they had paid in satisfaction of the rent decree. They obtained an ex parte money decree and purchased the equity of redemption of the mortgaged land. On the 13th February, 1946, the plaintiff brought the present suit for redemption of the mortgage land alleging that the mortgagee had practiced fraud, that money decree and the sale in execution were fraudulently obtained and that she ought to be granted a decree for redemption. The main ground for defiance was that the decree in the money suit was binding upon the plaintiff and by the court sale the plaintiff lost the equity of redemption. It was contended that the plaintiff was not entitled to redeem the mortgage without setting aside the money decree or the sale in the execution proceedings. Upon a consideration of the evidence the learned Munsif found that the defendants had fraudulently obtained the money decree against the plaintiff, that the sale held in the execution was a result of fraud and that the plaintiff was entitled to be granted a decree for redemption. In appeal the learned Subordinate Judge affirmed the findings of the Munsif holding that the claim of the defendant in the money suit was dishonest and that the decree and the sale were fraudulent.

26. In second appeal the matter was argued before my Lord the Chief Justice and Reuben, J. in the first instance. The Chief Justice held that under Section 44, Evidence Act the plaintiff was entitled to show that the money decree and the sale in execution proceedings were vitiated by fraud and should be treated as nullity, and that the plaintiff was entitled to redeem. Reuben, J. however expressed a contrary view to the effect that the plaintiff cannot ignore the sale and redeem the mortgage on the ground that the decree in money suit was fraudulent. The learned Judge was of opinion that the money decree cannot be challenged in this suit since the period under Article 95, Limitation Act for setting it aside had expired. The learned Judge further held that Section 44, Evidence Act had no application and that the plaintiff cannot challenge the validity of the execution sale either on the ground of fraud in the execution proceedings or on the ground of fraud in obtaining the decree.

27. In view of the difference of opinion this case has been placed before me for decision under clause 28 of the Letters Patent.

28. The question formulated is - "whether on the fact as stated in paragraph 2 (here para 18) of the judgment of Reuben, J. the plaintiff can ignore the sale on the ground that the decree was fraudulent".

29. In the approach to this question, it is important to remember that fraud does not make a judicial act or transaction void but only voidable at the instance of the party defrauded. The judicial act may be impeached on the ground of fraud or collusion in an active proceeding for recession by way of suit. The defrauded party may also apply for review of the judgment to the court which pronounced it. But the judgment may also be impeached in a collateral proceeding in which fraud may be set up as a defiance to an action on the judgment or as an answer to a plea of estoppel or res judicata founded upon the judgment. In (1835) 3 Cl.and Pin 479 (F). sales of estates had fraudulently taken place under decrees of the Court of Exchequer obtained by the collusion between the tenant for life, the mortgagor, the person in whose favour the charge had been created and the purchaser. The Court of Chancery in Ireland on the tenant in reminder

coming into possession granted him relief on a bill filed to redeem. The House of Lords affirmed the decree. Lord Brougham, after saying that it was undeniably true that the court of Chancery had no right to review a decree of the Court of Exchequer, added '(p.510)',

> "but it is equally true that if the decree has been obtained by fraud it shall avail nothing for or against the parties affected by it, to the prosecution of a claim or to the defense of a right."

And a little further on he said:

> "It is not an irregularity, it is not an error which is here complained of; but it is that the whole proceeding is collusive and fraudulent; that it cannot therefore be treated as a judicial proceeding, but may be passed by as availing nothing to the party who sets it up."

In - *'Philipson v. Earl of Egremont*[24]*',* on a scire facias against the defendant a shareholder in a company under 7 Wm. IV and I Vic, C; 75, on a judgment obtained by the plaintiff in a previous action against the registered officer of the company, the Court held good a plea that

> "the registered officer fraudulently and deceitfully and by connivance with the plaintiff suffered the judgment in order to change the defendant."

These two cases were referred with approval by Willes, J. in - *"Queen v. Saddler's Co*[25]*.',* where he said;

> "a judgment or decree obtained by fraud upon a Court binds not such Court nor any other; and its nullity upon this ground, though it has not been set aside or reversed, may be alleged in a collateral proceeding."

These cases demonstrate the principle that though a judgment is only voidable for fraud and though no suit has been brought to set it aside the judgment can be impeached in a collateral proceeding by a party who has suffered on account of the fraud.

30. A similar principle is enacted in Section 44, Evidence Act which states:

> "Any party to a suit or other proceeding may show that any judgment order or decree which is relevant under Sections 40, 41 and 42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion."

In - '26 Cal 891', a preliminary objection was taken that High Court had no jurisdiction to set aside a decree of the Alipore Court passing a decree upon an award to which the consent of the plaintiff, a pardanashin lady, had been fraudulently obtained and the relief sought should toe in the nature of a bill of review filed in the Alipore Court. It was held by Stanley, J. after review of all the authorities that the objection was sustainable and that the High Court had jurisdiction to

treat the decree of Alipore Court as a nullity and render its effect nugatory. In - '27 Cal 11', the plaintiff in a suit to recover possession of a tank adduced in evidence a petition of compromise and a decree obtained upon it in a previous suit between the same parties relating to the same tank. The defendants stated that the decree was obtained by fraud and therefore was not binding upon him. Stevens, J. held that the case was concluded by the decree in the previous suit and so long that decree was not set aside either by proceedings duly taken in that suit or by a separate suit brought for the purpose, it was not open to the defendant to challenge it in any subsequent suit in which it was used as evidence against him. Against this decision the defendant preferred an appeal under clause 15 of the Letters Patent and it was held by Maclean, C.J. and Banerjee, J. that under Section 44, Evidence Act the defendant was entitled to show that the
decree was obtained by fraud and the -case was accordingly remanded. To a similar effect is 24 All 242, and AIR 1926 Calcutta 1. Applying the principle to the present case it is clear that the defendant relied upon the previous decree in the money suit and the sale certificate as plea in bar either as estoppel or as res judicata. In a suit for redemption of a mortgage one of the main issues is concerned with the title of the plaintiff to redeem the property mortgaged. On this issue the sale in execution proceeding and the decree, exhibit E, upon which the execution proceeding was founded would operate as res judicata. In my opinion Section 40, Evidence Act, applies, and the plaintiff is entitled under Section 44 Evidence Act to show that both the decree and sale in the execution proceedings were vitiated by fraud of the mortgagee and should be ignored and treated as a nullity in the present suit.

31. I next turn to the argument pressed on behalf of the, appellants that the suit was brought more than three years after sale in execution proceedings and would be barred under Art 95, Limitation Act. It was argued that the plaintiff cannot invoke Section 44, Evidence Act since the money decree and the sale have not been set aside within three years of the date of the plaintiff's knowledge of fraud. In my opinion the argument is untenable. The language of Section 44 is very wide. The section lays down not merely a rule of law relating to evidence but it also lays down a rule of procedure as to how the judgment should be impeached. The section not merely declares that the judgment which is conclusive against a party may be impeached by such party on the ground of fraud or collusion. It also lays down that the party seeking to impeach it may impeach it in the very suit or proceeding in which the judgment is proved against him by his opponent. This construction is supported by the language of the section, especially the portions underlined

> "Any party 'to a suit or other proceeding' may show that any judgment, order or decree which is relevant under Section 40, 41 or 42, 'and which has been proved by the adverse party', was delivered by a court not competent to deliver it, or was obtained by fraud or collusion."

Learned Counsel has not pointed out any other section or other part of the Act which modify or qualify the ordinary meaning of the language used in the section. It is conceded that a judgment which a court is not competent to pronounce is void and not merely voidable and the party affected may challenge such a judgment at any time without bar of limitation. Grammatically, lack of jurisdiction and the taint of fraud or collusion are placed exactly on the same footing in wording of Section 44. "Any party to a suit or other proceeding may show that any judgment or decree or order....." was delivered by a court not competent to deliver it or was obtained by fraud or collusion. There is no reason why in the case of fraud or collusion any qualification or

limitation should be read into the section and not in the case of want of jurisdiction. It is therefore impossible to accept the argument that a party may impeach, a judgment on the ground of fraud under Section 44 only within a period of three years as provided by Article 95, Limitation Act. In my opinion, the question of limitation has no bearing in relation to Section 44 and it is open to the plaintiff in the present case to impeach the sale certificate and the money decree on the ground that they were vitiated by fraud. This view is supported by authorities. In 6 Bom 703, the defendants who were in the position of residuary legatees were allowed to dispute a decree of 1876 obtained by the plaintiff against an administrator on the ground that the decree represented a private debt due by the administrator to the plaintiff and had been obtained by fraud and collusion. The preliminary issue was

> "whether the said decree is not for the purposes of this suit, a binding and valid decree and whether the said decree is not in this suit binding upon the defendants and each of them, and whether the defendants or any or either of them, can in this suit in any way object or dispute the said decree."

It was held by Latham, J. that defendants were entitled to set up such fraud and collusion in their defense in the suit. To a similar effect is - *'Rangnath Sakharam v. Govind Narasing*[26]*,'* in which the plaintiff sued in the year 1900 to recover from the defendant the amount due for interest on a mortgage bond dated 15-4-1893 by sale of the mortgaged property. The defendant contended that he did not execute the bond with free consent, and that it was obtained from him under pressure of proceedings. It was held that the defendant was entitled to resist the claim made against him by pleading fraud and that he was entitled to urge that plea though he had not brought a suit to set aside the transaction. Again in AIR 1921 Patna 193 (FB), the plaintiff sued for declaration of title and for possession of 8 arinas share of an estate in Santal Parganas in respect of which Brajeswari Debi, the plaintiff's stepmother was recorded. The plaintiff alleged that he was brought up by Brajeswari after his father's death, that she acted as his de facto guardian, and in betrayal of her position of trust she fraudulently and dishonestly caused the 8 annas share to be entered in her name in the settlement Records, when in fact the plaintiff alone was entitled to the property as his father's heir. In his dissenting judgment Mullick, J. held that Section 44, Evidence Act was merely a rule of evidence, that the suit ought to have been framed as a suit to set aside the decree of Settlement Officer, and that Section 44 could not absolve the plaintiff from obedience to the rules of pleading and of the Limitation Act. This view was not accepted by the majority of the Full Bench who were of opinion that it was open to the plaintiff to show that the entry in the record of rights was obtained by fraud, in which case settlement would be null and void and it was not necessary to institute a suit to set it aside. In pp.196, 197 Dawson Miller, C.J. states:

> "There can be no doubt in my opinion that a record properly made under the rules provided in the Regulation was meant to be final and conclusive except as therein provided and that the jurisdiction of civil courts regarding any matters decided by the settlement courts should be barred, the entry in the finally published record having the force and effect of a decree of court. The result, therefore, is that the appellant's claim is met by the plea that the averment that he is entitled to the whole 16 annas upon which the claim is based is no longer open to him, the contrary having been declared by the Record-

> of-Rights which has the effect of a decree of court. The plea is in substance a plea of res judicata. It is nevertheless open to the plaintiff to reply in answer to this plea that the settlement record was obtained by fraud and if this can be proved there can be no question of res judicata. If the settlement
> record was in fact obtained by a fraud practised upon the settlement court there was in the eye of the law no settlement record at all upon the matter in question and it can be treated as nullity. Section 44, Evidence Act specially provides for such a case and it is not necessary that the appellant should first institute a separate suit to set aside the record on the ground of fraud".

A similar view has been expressed in - *'Srirrangammal v. Sandammal*[27]*"*and - *'Gnaniar Rowther v. V. Krishna Aiyar*[28]*',*

32. For the reasons I hold that upon the facts stated the plaintiff can ignore the sale on the ground that the decree in the money suit was fraudulent and that the plaintiff is entitled to be granted a decree for redemption of the mortgaged land.

33. The matter may also be approached from a different aspect. I think that the present case falls directly within the equitable principle embodied in Section 90, Trust Act which states:

> "Where a tenant for life, co-owner, mortgagee or other qualified owner of any property by availing himself of his position as such, gains an advantage in derogation of the rights of the other persons interested in the property, or where any such owner, as representing all persons interested in such property, gains any advantage, he must hold, for the benefit of all persons so interested the advantage so gained, but subject to repayment by such persons of their due share of the expenses properly incurred, and to an indemnity by the same persons against liabilities properly contracted, in gaining such advantage".

The section is based on the equitable principle that no person who is in a fiduciary position can make a profit out of that position to the detriment of person, who is beneficially interested in the property. The mortgagee clearly stands in a position of fiduciary relationship and he cannot avail himself of his position as such to gain advantage in derogation of the rights of the mortgagor: and under the express provision of Section 90, Trust Act the mortgagee must hold the advantage so gained for the benefit of the mortgagor. On this aspect of the case also Mr. Raghosaran Lal raised the question of limitation and argued that since the decree in the money suit has not been set aside within three years as provided by Article 95 the plaintiff cannot be granted a decree for redemption. The argument proceeds upon misconception. It is not necessary for the application of the equitable principle that the plaintiff should sue for setting aside the money decree or the sale. His suit is in effect to quote the language of the Judicial Committee in - *'Nawab Sidhee Nazir Ali Khan v. Rajah Ojoodhyaram Khan*[29]*,* , "to confess and avoid that sale, by imposing a trust on the estate which passed under it". It is not necessary therefore that the decree or sale should be set aside in order to grant to the plaintiff a decree for redemption of the mortgage. In the eye of law the sale certificate which defendants have obtained would enure to the benefit of the plaintiff and the property would be stamped with a trust jin favour of the plaintiff. The

plaintiff can therefore claim a decree for redemption without setting aside the money decree or the sale in the execution
proceedings.

34. This view is supported by a sequence of authorities. In - *'Chandi Mander v. Sitabi Bhagat', 21 Pat LT 699(Supra) ,* the mortgagees did not pay rent, though they were under the terms of the mortgage bond to do so. The consequence of such default was that landlords took possession of the holding under Section 87, Bihar Tenancy Act. Later the mortgagees obtained settlement of the land from the landlord. In this state of facts it was held by a Division Bench that it was the clear duty of the mortgagee from a tenant who is in possession of the land to maintain his possession as against the landlord; that he could not by suffering dispossession put an end to the tenancy and then proceed to take a settlement of land from the landlord. The mortgagee could not change his character as a mortgagee by taking a settlement from the landlord; for if he took a lease in his own name it must be held in law that he had taken it for the benefit of the mortgagor. To the same effect is - *'Ram Rup Singh v. Jang Bahadur Singh', AIR 1951 Patna 566 (supra),* in which the plaintiff had executed a sudhbharna bond and left the consideration money with the sudhbharnadars to satisfy a rent decree up to the properties. The sudhbharnadars did not pay the rent decree and the properties were sold in execution for the rent decree and purchased by the landlord who subsequently settled them with the sudhbharnadars. It was held that the sudhbharnadars held the decretal amount as trustee for the plaintiffs and having failed to avert the sale cannot claim a benefit arising from their own default and resist the right of redemption on the footing that the old tenancy had been extinguished by the rent sale.

35. Applying the principle to the present case it is manifest that the defendant cannot resist the suit for redemption on the ground that they had purchased the mortgage properties in execution of a fraudulent decree. Both the lower courts have found that the mortgagees defendants had practised fraud in obtaining the decree and purchased the equity of redemption in execution of the fraudulent decree. Upon these findings it is manifest that the defendants must hold the advantage gained by them for the benefit of the mortgagor. In my opinion the plaintiff has been rightly granted a decree for redemption by both the lower courts and that the second appeal to the High Court should be dismissed. For the reasons assigned I agree with my Lord the Chief Justice and hold that upon the facts stated the plaintiff can ignore the sale on the ground that the decree in the money suit was fraudulent and that the plaintiff is entitled to be granted a decree for redemption of the mortgaged land. I regret that I have reached a conclusion different from that Reuben, J., for whose opinion I have always great respect.

Appeal dismissed.

Cases Referred.

[1]32 Ind App 123 at P.132 (PC)
[2]29 Bom 435 (FB)
[3]1850 3 HLC 49 at p.63
[4](1747) 27 ER 490)
[5](1868) 2 Exch.15
[6](1835) 3 Cl and Fin 479
[7]6 Bom 703, at p.715
[8]19 Bom 821, at p.826

[9]26 Cal 891
[10]27 Cal 11
[11] AIR 1928 Cal 1
[12]24 All 242
[13] AIR 1837 All 28
[14] AIR 1921 Patna 193, at pp.196, 197 (FB)
[15] AIR 1930 Cal 263
[16] AIR 1920 Cal 363 (FB)
[17] AIR 1926 Cal167
[18]14 Cal LJ 643
[19] AIR 1916 Cal 905
[20]26 Cal 326 Foot Note 3
[21]6 All 406
[22] AIR 1933 Pat 473
[23]68 Cal LJ 431
[24](1844) 6 QB 587
[25](1863) .10 HLC 404 at p.431
[26]28 Bom 639
[27]23 Mad 216
[28] AIR 1914 Mad 361
[29]10 Moore's Ind App 540 (PC)