Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Ram Tuhul Sing v. *Biseswar Lall Sahoo and another, from the High Court of Justice at Calcutta; delivered 2nd March*, 1875.

Present:

SIR JAMES W. COLVILE.
SIR MONTAGUE SMITH.
SIR ROBERT P. COLLIER.

THE point raised by this Appeal is one of novelty, and of some nicety. The facts out of which it arises are undisputed.

The Appellant is one of the registered shareholders of a certain estate which, on the 16th of February, 1867, was sold for arrears of Government Revenue, under the last Sale Law, Act XL, of 1859. The sale was confirmed by the Revenue Commissioners on the 14th of the following June; and, after deducting the arrears of Government revenue and sale expenses, the sum of rupees 1,39,692:2:5 remained as surplus proceeds in deposit in the hands of the Collector. The share of the Appellant in such surplus proceeds, if the sale had stood, would have been upwards of rupees 35,500. On the 24th of February, 1868, however, the Appellant, suing *in formâ pauperis*, instituted a suit for the purpose of setting aside the revenue sale, on the ground of the non-observance of one of the formalities prescribed by the Act. The suit was dismissed by the subordinate Judge; but, on Appeal, the High Court, by an Order, dated the 3rd of May, 1870, reversed his Judgment, and remanded the cause for the trial of an issue which he had left untried; and on its coming back to them with the finding on that issue, made a final Decree in the Appellant's favour, on the 31st of

January, 1871. Against that Decree there was an Appeal to Her Majesty in Council, which was dismissed, in conformity with the Judgment delivered at this Board on the 18th of December, 1873. The sale, therefore, has been conclusively set aside; the estate restored to the Appellant and his co-sharers; and the purchase-money returned to the purchaser.

Before this, however, and on the 25th of November, 1867, one Sheo Pershad Sookul, a judgment creditor of the Appellant, attached his interest in these surplus proceeds in the collector's hands, and on the 23rd of December, 1867, obtained an order for the sale of that interest in execution. The sale was originally fixed for the 3rd of February following, but, on the Appellant's application, was postponed for a fortnight, and took place on the 18th of February, 1868, when the Appellant's interest in the surplus proceeds was knocked down for 8,000 rupees to one Juldhari Panday, who afterwards declared that he bought, as agent for, and on account of the Respondents. On the 16th of March, 1868, the Appellant filed a petition for the reversal of this sale on two grounds: 1st, that the surplus proceeds had not been ascertained to belong to the Petitioner, inasmuch as he had instituted a suit to set aside the revenue sale, which was then pending; and secondly, that the sale had been held in contravention of the 242nd section of the Code of Procedure, which prescribes a different mode of enforcing an execution against money in the hands of a third party, and, consequently, that the sale was irregular. The Principal Sudder Ameen, in whose Court these execution proceedings were pending, by two orders, dated the 18th of April, 1868, disallowed these objections, and confirmed the sale; the formal certificate was, however, not delivered to the Respondents until the 28th of August, 1868. Of the 8,000 rupees which had been paid into Court upon the sale, about 5,318 rupees were drawn out by Sheo Pershad Sookul, and applied in satisfaction of the Decrees held by him; and the residue was drawn out by other judgment creditors of the Appellant, and similarly applied by them.

On the 14th of August, 1871, the Respondents petitioned the Collector for payment to them as purchasers under the execution sale of the whole

of the Appellant's assumed share in the surplus proceeds of the revenue sale, being upwards of 35,500 rupees. The High Court had then made its final Decree, setting aside the sale; and the Collector therefore refused to part with the fund. Upon that, and on the 4th of August, 1872, the Respondents instituted the present suit for the recovery of rupees 11,714 : 10 : 8, being the 8,000 rupees with interest, calculated from the date of the payment into Court. It was brought against the Appellant, against the heir of Sheo Pershad Sookul, and against the other Judgment creditors of the Appellant who had shared in the 8,000 rupees; and the cause of action is thus stated in the Plaint: "As the rights of the Judgment debtor with respect to the surplus sale proceeds of the said Mehal did exist up to the time of the execution sale held in the case of Sheo Pershad Sookul, and as by reason of the revenue sale having already been confirmed, there was no reasonable ground of apprehension with respect to such surplus proceeds; and as the Collector now objects to make over the surplus proceeds on the ground of the revenue sale being set aside; for these reasons, and, moreover, in consideration of the fact, that the debts due by the Judgment debtor have been satisfied out of the consideration money paid by your Petitioners, and that the Judgment debtor cannot be permitted to derive two-fold advantages, since he has been benefitted by the reversal of the sale of the land, and he has not deposited in Court the amount of the purchase-money paid by your Petitioners, the Plaintiffs are, under such circumstances, entitled by all means to recover the said purchase-money, with interest. The cause of action has accrued from the 25th of August, 1871" (the date of the Collector's refusal to pay).

It does not appear very clearly with what object the Respondents sued the execution creditors, whether or not in order to establish an alternative case for relief against them, in case the suit should fail against the Appellant. The issues settled however seem to imply that the claim was for recovery of the money against one or other of the Defendents.

The Court of First Instance dismissed the suit with costs against all the Defendants, holding that the Plaintiffs had established no title to a refund of the

purchase-money paid. But the High Court on appeal reversed this decision, and made a decree for the recovery of the amount claimed from the Appellant; dismissing the suit as against the other Defendants, but without costs as regarded the representative of Sheo Pershad Singh.

The Appeal is against the last Decree, and the single question is, whether the Plaintiffs (the Respondents) have shown that they have any cause of action for the recovery of this money against the Appellant.

The Appeal has, to their Lordships' great regret, been heard *ex parte*. This circumstance has rendered them the more anxious to give full weight to every reason assigned by the learned Judges of the High Court in support of their Decree, and to every consideration that can be suggested in favour of the absent Respondents. But they have, nevertheless, come to the conclusion that the Respondents have established no title to recover the sum sued for from the Appellant, and that the Appeal ought to be allowed.

The learned Chief Justice of Bengal, in the Judgment delivered by him, with the concurrence of the two other Judges who sat with him, says:—"I think the rule that ought to be applied in this case, is that which is applied by Courts of Equity where sales are set aside on account of fraud, or for other reasons which are held by the Court to vitiate the sale." And he then cites and relies upon a passage in Lord Cottenham's Judgment in *Bellamy* v. *Sabine*, 2 *Phill.*, which he treats as establishing the broad proposition —that where a transaction ought never to have taken place, the rights of the parties are, as far as possible, to be placed in the situation in which they would have stood if there had never been any such transaction. This observation of Lord Cottenham's was, however, made with reference to a particular objection taken to the granting equitable relief in that somewhat complicated case. The Bill in *Bellamy* v. *Sabine* impeached two transactions: one, by which a needy father, tenant for life, and a needy son, tenant in tail, had, at the instigation of Sabine, a creditor of the father, come to a certain arrangement which involved the barring of the entail; the other, a transaction by which the son had sold and conveyed his remainder in fee, thus acquired, to

Sabine. The son died in his father's lifetime, and the suit was brought by another son, who was next in remainder under the entail. Lord Cottenham held that the Plaintiff was entitled to sue either in that character, or as heir-at-law of his brother; that the transaction between the father and the elder brother could not be successfully impeached; but that the purchase from the latter by Sabine was fraudulent, and ought to be set aside. And then proceeding to deal with the objection which had been taken, that the personal representative of the elder brother had an interest in supporting that purchase, part of the purchase-money being still unpaid, and that it was contrary to the course of the Court to deal with the conflicting rights of the real and personal representatives, he made the observation relied upon. In fact, he ruled only that an interest derived under the conveyance impeached could not affect the equitable right of the heir-at-law to have that conveyance set aside for fraud. If this principle has any application to the present case, it seems to be against rather than in favour of the Respondents. The conveyance was set aside on the terms ordinarily imposed, viz., the repayment by the Plaintiff to Sabine of the sums actually paid by him.

In their Lordship's opinion, however, the case of *Bellamy* v. *Sabine*, and the other cases in equity which are cited in the Judgment under appeal, are inapplicable to the present, upon the broad ground that they all proceed upon the doctrine of Courts of Equity—that a Plaintiff who comes to be relieved from his own act, or the act of one whom he represents, on equitable grounds, must do equity, and submit to those equitable conditions which the Court may see fit to impose on its grant of relief. Here the Appellant is not seeking the aid of the Court, but is sued as a Defendant, and the money sought to be recovered has not been paid under any contract of his, or in any transaction to which he was a consenting party, but under proceedings taken *in invitum*.

Again their Lordships must observe that a fallacy, occasioned by some confusion in the use of the words "transaction" and "sale," seems to run through the Judgment. What is the transaction or sale which has been set aside? It is not the execution sale under which the 8,000 rupees were paid,

but the statutory revenue sale. A good deal, no doubt, has been said in the Judgment of the Court of First Instance, and something has been said here at the bar, of the irregularity of the execution sale, and of the miscarriage of the Principal Sudder Ameen in putting up the Appellant's possible interest in the surplus proceeds for sale, instead of proceeding under the 242nd section of the Code of Procedure. And their Lordships think it is much to be regretted that that officer did not proceed under the wholesome provision which was designed in such cases to remedy a mischief of frequent occurrence in India—the ruinous sacrifice of property which an execution sale is apt to involve. But they must observe that since the objections of the Appellant were overruled, no attempt has been made to question the regularity or legal effect of that sale; that the Respondents held to it as long as there was a hope of their getting anything by it; that their present suit is not framed with the object of setting it aside, or of being relieved from it; and consequently that any Jndgment declaring its invalidity, or treating it as a nullity, would be extra-judicial.

The learned Chief Justice no doubt seeks to meet the objection just taken by saying that the Appellant ought to have made the Respondents parties to the suit for setting aside the revenue sale, and holds that the Court ought to give them in this suit the relief which he assumes they would, if they had been made parties to it, have obtained in the other suit, by way of condition on the relief then granted. Their Lordships, however, fail to see that there was any obligation on the Appellant to make the Respondents parties to that suit, and have some doubt whether this question could have been litigated in a suit, the only object of which was to determine whether a statutory sale was to stand good, or was to be set aside upon the terms prescribed by the Statute. And in any case it would seem that the Respondents, if they conceived that they had an interest entitling them to defend that suit, of which they had full notice, might have applied to be made parties to it under the 73rd section of the Code of Procedure.

Upon the whole, then, their Lordships are of opinion that the course and practice of the Court of Chancery in setting aside transactions on account of fraud, or other recognized ground for equitable

relief, afford no support to the Decree under appeal.

Upon what ground, then, can the Respondents be said to have a substantive cause of action for the recovery of this money from the Appellant?

What was the real nature of their purchase at the execution sale? What did they buy? They bought the Appellant's interest in the surplus proceeds, subject to the contingency of his succeeding in his suit to set aside the revenue sale, in which event that interest would become *nil*. They did this with their eyes open, since, at least before the sale was confirmed, they had notice that his suit had been commenced. There was no warranty or contract on his part. The sale was had under proceedings *in invitum*, and indeed against his express protest. The parties were at arm's length. The Appellant was free to prosecute his suit; the Respondents free to enforce their rights, should he fail, to the uttermost farthing. What they bought, then, was the chance of getting 35,500 rupees for 8,000 rupees, dependent on the happening or non-happening of a certain event. And a substantial chance it must be taken to have been, since the construction of the clause in the Sale Law, on which the right to annul the sale depended, was doubtful, and the Court of First Instance determined the question against the Appellant. If that Judgment had stood, he would have lost his land; and the Respondents would have taken from him all its proceeds, except the 8,000 rupees applied in satisfaction of his debts. It is difficult to see upon what general equity existing between parties thus situated the Appellant ought to be compelled to restore the Respondents to their original position, because the event on which they speculated has ultimately gone against them.

Then it is said that if the Respondents fail in the present suit, the Appellant will not only keep the estate which he has recovered, but will get debts to the amount of 8,000 rupees, for which his property was liable to be attached and sold, paid with the Plaintiffs' money.

But even if this were true, it is not in every case in which a man has benefitted by the money of another, that an obligation to repay that money arises. The question is not to be determined by

nice considerations of what may be fair or proper according to the highest morality. To support such a suit there must be an obligation, express or implied, to repay. It is well settled that there is no such obligation in the case of a voluntary payment by A of B's debt. Still less will the action lie when the money has been paid as here, against the will of the party for whose use it is supposed to have been paid (Stokes *v.* Lewis, 1 Term, Reports 20). Nor can the case of A be better because he made the payment not *ex mero motu*, but in the course of a transaction which, in one event would have turned out highly profitable to himself, and extremely detrimental to the person whose debts the money went to pay.

Their Lordships can find no ground on which the legal liability of the Appellant can satisfactorily be rested. The case seems to them to fall within the principle of that reported in the 4 Bengal Law Reports, Full Bench Ruling, page 11. The fact that in this case the worthlessness of the subject purchased was a consequence of the success of the Judgment debtor in his own suit, and not of a recovery by a third party under a superior title, does not appear to them in the circumstances of this case to afford a distinction which ought to prevent the application of that principle.

Their Lordships, for obvious reasons, express no opinion whether the Respondents could have had any remedy against the execution creditors by a suit for setting aside the execution sale or otherwise; whether in such a case the right of the Judgment creditors would not have been revived against the Appellant; or whether, if such a remedy ever existed, the Plaintiffs have lost it by the dismissal of this suit against those creditors. These and other questions were suggested in the course of the argument, but in determining this Appeal it is unnecessary, and, indeed, would be improper to decide them.

Their Lordships will humbly advise Her Majesty to allow this Appeal, and to direct that the Decree of the High Court be varied by omitting so much thereof as orders and decrees "that the Plaintiffs do recover from the first Defendant the sum of Rs. 11,714 : 10 : 8, the principal and interest of money which they had paid upon a sale to them of

the rights and interests of Ram Tuhul Singh in the surplus sale proceeds of a Talook Muleck Alypore Buzoorg, which had been sold for arrears of Government revenue, and purchased by the Plaintiffs on the 18th of February, 1868;" and as orders and decrees "that Ram Tuhul Sing, Defendant, Respondent, do pay to the Plaintiffs, Appellants, this sum of Rs. 470: 10: 2;" and as orders and decrees "that the said first Defendant do pay to the Plaintiffs the costs incurred by them in the Lower Court;" and by ordering and decreeing in lieu thereof that the suit of the Plaintiffs do stand dismissed as against the Defendant, Ram Tuhul Singh, and that the Plaintiffs do pay the costs incurred by the said Defendant both in the Lower and in the High Court.

Their Lordships are disposed to recommend an Order in the above form, because they do not wish to interfere with the discretion exercised by the High Court in refusing to give his costs of the suit to the Defendant Byjnath Sookul. The Appellant must also have the costs of this Appeal.

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