

APPELLATE CIVIL.

Before Mitter and M. C. Ghose JJ.

THE MIDNAPUR ZEMINDARI COMPANY
LIMITED

1933

Jan. 3, 17.

v.

ABDUL JALIL MIYA.*

*Minor—Sale in execution—Ratification by conduct—Estoppel—Decree—
Amendment of decree.*

A sale in execution of a decree passed against several persons, of whom one was a minor and was not represented by a guardian in the suit, was void so far as the minor's share was concerned.

The minor, on attaining age, having allowed the surplus sale-proceeds to be applied in execution of other decrees against him, was held to have ratified the sale by his act and was estopped from challenging it.

APPEAL FROM ORDER by the decree-holders.

The Midnapur Zemindari Company, Limited, the appellants, brought a rent suit against Abdul Jalil Miya, Esmail Hossain Miya, then a minor, and two other persons, all of whom were *darpatnidárs* under them. Esmail was then represented by Ainuddin, his guardian *ad litem*. The defence was that the plaintiff-company had dispossessed the defendants of a portion of the *darpatni* and, therefore, no rent was payable. The suit was dismissed and the lower appellate court upheld the dismissal; but, on appeal to the High Court, the suit was remanded for trial, as to the extent of dispossession. During these proceedings, Ainuddin died, and, at the hearing of the suit on remand, the minor was not represented by a guardian. A decree was passed and the property was sold in execution, the plaintiff-company purchasing the same for Rs. 35,000. The sale-proceeds, after meeting the decretal amount, left a balance of Rs. 30,000. During

*Appeal from Original Order, No. 239 of 1932, against the order of Tara-prasanna Chatterji, Subordinate Judge of Nadia, dated March 29, 1932.

1933

*The Midnapur
Zemindari
Company
Limited*
v.
*Abdul Jalil
Miya.*

all this period, two other suits were filed by the plaintiff-company for subsequent rent being suits Nos. 7 of 1926 and 11 of 1930. These two suits were decreed and, from the surplus sale-proceeds, the claim in Suit No. 11 of 1930 was satisfied. By that time, Esmail came of age. In the judgment in Suit No. 7 of 1926, it was directed that the tenure should be sold first in execution of the decree, in accordance with a stipulation in the *darpatni pāttā*, but somehow that clause was omitted from the decree. Subsequently, on application, the decree was amended, bringing it in conformity with the judgment. The plaintiff-company applied for execution of the decree in Suit No. 7 of 1926 by attachment and sale of the personal properties of the said Abdul Jalil Miya, one of the judgment-debtors. The objection was that personal execution could not be levied till the property was sold in accordance with the amended decree and, the sale of Esmail's share being void, the *darpatni* had to be sold in its entirety. The Subordinate Judge upheld the objection and directed that the tenure should be sold first and, if any balance was left, then the decree could be executed personally against the judgment-debtors.

• Against that order Midnapur Zemindari Company preferred this appeal in the High Court.

U. N. Sen Gupta and *Manmathanath Das Gupta* for the appellants.

Rupendrakumar Mitra and *Phanindranath De* for the respondents.

Cur. adv. vult.

MITTER J. This appeal is directed against two orders embodied in one judgment of the Subordinate Judge of Nadia, which is dated the 29th March, 1932. The first order, which is attacked, is an order directing amendment of a rent decree, and the second order, challenged by this appeal, is one refusing personal execution of the decree against the respondent as asked for by the decree-holders, appellants.

The questions which fall for determination in this appeal depend on facts which are either admitted or have been proved in this case. They may be briefly stated. It appears that the Midnapur Zemindari Company, Limited, now appellants, brought a rent suit in the year 1923 against four persons, namely, Abdul Jalil Miya, now respondent, Esmail Hossein Miya, a minor represented by this guardian *ad litem* Ainuddin and two other persons who were the *darpatnidârs* under them. The rent suit was for arrears for the period 1327 to *Poush kist* of 1329 B.S. The defence to the suit was that the plaintiffs, the Zemindari Company, Limited, had dispossessed the defendants from a portion of the *darpatni* and there should be entire suspension of rent. This defence was given effect to by the Subordinate Judge, who tried the suit in the first instance, and the plaintiffs' suit was dismissed. This decree of dismissal was affirmed by the District Judge on appeal. There was a further appeal to the High Court by the plaintiff-company and, during the pendency of the Second Appeal, Ainuddin, the guardian of Esmail, died, but no new guardian was appointed in his place. On the 10th February, 1928, the High Court decreed the appeal and sent back the case for determination of the extent of dispossession by the plaintiffs and for passing a decree in plaintiffs' favour, after allowing proportionate abatement of rent to the defendants on account of the dispossessed area. On remand, Esmail was not represented by a guardian and a decree was passed in favour of the plaintiffs for Rs. 4,092 and odd, not only against the three defendants who were properly represented, but also against Esmail Miya, who was not represented by a guardian *ad litem*. In execution of this decree, the sale of the *darpatni* took place on the 9th July, 1931, and it was purchased by the plaintiff-company for Rs. 35,000. As the claim for rent was for Rs. 5,000 there was a surplus of Rs. 30,000 in favour of the judgment-debtors, the four defendants in the suit.

1933

The Midnapur
Zemindari
Company
Limited

v.

Abdul Jalil
Miya.

Mitter J.

1933

*The Midnapur
Zemindari
Company
Limited*

v.
*Abdul Jalil
Miya.*

Mitter J.

During the pendency of this suit before the Subordinate Judge after remand by the High Court, two other suits for rent of the same *darpatni* for a subsequent period had been instituted by the plaintiff-company. They were Rent Suits Nos. 7 of 1926 and 11 of 1930. These suits were jointly tried and were decreed on the 31st March, 1931. From the surplus sale-proceeds of the sale in execution of the rent decree in suit No. 3 of 1923, the entire claim of the Rent Suit No. 11 was satisfied and a substantial portion of the decree in Rent Suit No. 7 of 1926 was satisfied. The plaintiff-company have executed the decree for the balance in Rent Suit No. 7 of 1926 and have attached the personal properties of the respondent Abdul Jalil Miya, who is one of the judgment-debtors in the suit. In order to understand the objection of the judgment-debtor, Abdul Jalil Miya, one fact has to be borne in mind, and that is this:—In the judgment of Rent Suit No. 7 it was directed that the tenure should be sold first in execution of the decree in accordance with a stipulation in the *darpatni pattā* (Ext. 2) to that effect, but this clause was omitted from the decree and an application was made for the amendment of the decree by bringing it into conformity with the judgment and the amendment of the decree has been made. The order allowing amendment, as has been already stated, has been attacked in this appeal and we will return to this hereafter. The main objection of the respondent judgment-debtor to this personal execution is that, as, according to the decree as amended, the tenure must be sold in the first instance and as the sale of three annas share of Esmail Miya is absolutely void, as the sale was in pursuance of a decree in a suit in which he was not properly represented, three annas share of the tenure still remains unsold and, according to the decree, no personal execution can issue against one judgment-debtor till the *darpatni* tenure in its entirety is sold. This objection has prevailed with the learned Subordinate Judge below, and he has allowed the

objection and has directed that the tenure should be sold first and, if any balance be left, then it could be executed personally against the judgment-debtor.

The Midnapur Zemindari Company has, accordingly, preferred this appeal and the learned counsel raises two contentions before us: (1) that the decree in Suit No. 7 of 1926 should not have been allowed to be amended at the late stage after it has been partly satisfied and that the execution court has no jurisdiction to amend the decree. (2) The second contention may be subdivided under three heads: (a) that the sale of Esmail's share is not a nullity and (b) even if the sale be regarded as void, the fact that Esmail was represented in the proceedings in execution and his guardian took part in the proceedings relating to the settlement of value of the property to be advertised for sale estops him from challenging the validity of the sale, and (c) even if that is not so, the fact that Esmail, after attaining majority, allowed the surplus sale-proceeds of the sale which is impeached as void to be applied to the satisfaction of the decree in Rent Suit No. 11 and partly of Suit No. 7 of 1926 estopped him from challenging the sale.

The first contention of the appellant has really no substance, for it is now well settled that a decree could be brought into conformity with the judgment even after the lapse of years and that the only limitation is that the court may deem it inexpedient or inequitable to exercise its powers where third parties have acquired rights under the erroneous decree without a knowledge of the circumstances which would tend to show that the decree was erroneous: see *Hatton v. Harris* (1). In the present case, no rights of third parties had intervened at the date of the amendment of the decree. We are, consequently, of opinion that amendment has been rightly allowed. There is no substance also in the contention that the court could not amend the decree in the course of execution. It appears that the executing court and

1933

*The Midnapur
Zemindari
Company
Limited*

v.
*Abdul Jalil
Miya.*

Mitter J.

(1) [1892] A. C. 547, 564.

1933

*The Midnapur
Zemindari
Company
Limited*

v.
*Abdul Jalil
Miya.*

Mitter J.

the court which passed the decree are one and the same, and it was at the instance of the appellant that orders on the petition for amendment were not passed till after the merits of the objection case was heard.

Taking now the first branch of the appellants' second contention that the sale of Esmail's share is not a nullity, it appears to me that this contention cannot be sustained, for it is now well established on the highest authority that the court has no jurisdiction to sell the property of persons who were not parties to the proceedings or properly represented on the record. As against such persons, the decrees and sales purporting to be made would be a nullity and might be disregarded without any proceeding to set them aside. If authority be desired for these elementary propositions, it may be found in the judgment of Sir Barnes Peacock in *Kishen Chunder Ghose v. Ashoorun* (1); see the observations of Lord Davey in *Khizarajmal v. Daim* (2). In the present case Esmail was not represented in Rent Suit No. 7 after remand. Consequently, the sale of his share is void and of no effect in law.

The second branch of the second contention is that, even if the sale be regarded as void as Esmail was represented in the execution proceeding which led to the sale by his uncle Jahiruddin (see Ext. B), it must be taken that the sale of Esmail's share was ratified. This contention does not seem to me to be right, for Esmail was a minor at the date of the execution proceedings and no act done by his guardian during his minority can render a void sale valid.

The third branch of the second contention, namely, that there was ratification of the sale by Esmail after he had attained majority, seeing that, after attaining age, he allowed the surplus sale-proceeds to be taken in execution of the decree for rent for the subsequent period, seems to me to be well founded and must prevail. It has not been disputed before us that

(1) (1863) 1 Marsh. 647.

(2) (1904) I. L. R. 32 Cal. 296 ;
L. R. 32 I. A. 23.

Esmail had attained the age of majority when rent decree in Suit 11 of 1930 was executed and the sale-proceeds were applied to his use or for his benefit, as it extinguished his liability for rent for the period covered by Suit No. 11 of 1930, and this circumstance must be regarded as ratification by him of the sale in execution of the rent decree in the suit of 1923. In allowing the surplus sale-proceeds to be taken for satisfying his liability in the rent decree No. 11, he has ratified the sale by a course of conduct which estops him from denying the validity of the sale, and indeed it is a significant circumstance that Esmail has never applied to set aside the sale. The law with regard to ratification of void sale by the acts of the parties in interest has been well put by Mr. Freeman in his *Law of Void Judicial Sales* (section 50 page 170) and may be usefully reproduced here :—

As a general rule a confirmation or ratification cannot strengthen a void estate. "For confirmation may make a voidable or defeasible estate good, but cannot operate on an estate void in law". If this rule be one of universal application, then there can be no necessity for considering the question of ratification in connection with void judicial sales. But this is one of those rules which are so limited by exceptions that the circumstances to which it may be applied are scarcely more numerous than those from which its application must be withheld. There can now be scarcely any doubt that void judicial sales are within the exceptions, and are unaffected by the rule. These sales may be ratified either directly or by a course of conduct which estops the party from denying their validity. Thus, if the defendant in execution, after a void sale of his property has been made, claims and receives the surplus proceeds of the sale, with a full knowledge of his rights, his act must thereafter be treated as an irrecoverable confirmation of the sale.

Esmail having ratified the sale, it is not open to him again to challenge the validity thereof and far less is it open to the present respondent to impeach the sale. There can be no question that, as against him, the sale of Esmail's share must be regarded as valid.

The result is that the Subordinate Judge's order regarding the amendment of decree must stand and that his order directing that the tenure should be sold first must be set aside. The plaintiff decree-holders will be entitled to proceed against the respondent judgment-debtor for the realisation of the balance

1933

*The Midnapur
Zemindari
Company
Limited*

v.
*Abdul Jalil
Miya.*

Mitter J.

1933

*The Midnapur
Zemindari
Company
Limited*

v.
*Abdul Jalil
Miya.*

Mitter J.

due under the decree in Suit No. 7 of 1926. This appeal, in so far as it is directed against the order giving effect to the objection of the respondent Abdul Jalil Miya to personal execution, is allowed with costs here and in the court below.

We assess the hearing fee in this Court at two gold mohurs.

In view of our judgment in the appeal, no order is necessary in the Rule (Civil Rule No. 707M. of 1932).

M. C. GHOSE J. I agree.

Appeal allowed in part.

N. G.