

*Before Mr. Justice Tottenham and Mr. Justice Norris.*

1887  
June 17.

GANGA PROSAD CHOWDHURY (PLAINTIFF) *v.* UMBICA OLIURN  
COONDOO AND OTHERS (DEFENDANTS).<sup>\*</sup>

*Minor, Suit against—Misdescription in title of the plaint and in decree,  
Effect of.*

In a suit brought against a minor widow as the heir of her deceased husband, she was described in the cause title of the plaint as "the deceased debtor Ramnath Acharjee's heir and minor widow Benodini Dabea's mother and guardian Anundomoyee Dassoe." The plaintiff obtained no order for the appointment of a guardian *ad litem*. He, however, obtained a decree, and the minor defendant was described therein in the same manner: *Held*, that the minor was neither a party to the original suit nor to the decree, and that no property of the minor passed upon a sale in execution of such decree. *Suresh Chunder Wum Chowdhry v. Jugut Chunder Deb* (1) distinguished.

THIS suit was brought by the plaintiff to recover possession of certain property purchased by him in execution of a decree obtained by himself, the sale having taken place in 1879. He alleged that he was put in possession by the Court in 1881, and was shortly after dispossessed by the defendant. In 1878 he had sued upon a mortgage bond executed by one Ramnath Acharjee then deceased. Ramnath had left a minor widow named Benodini Dabea. That suit was brought against Anundomoyee, described as the mother and guardian of Benodini Dabea, the minor widow of the late Ramnath Acharjee, the precise description in the cause title being as follows: "The deceased debtor Ramnath Acharjee's heir and minor widow Benodini Dabea's mother and guardian Anundomoyee Dassoe, caste Acharjee, profession cultivation, inhabitant of Daoli *alias* Johurpur, Division Munglekote, Chowkeo Cutwa, Zillah Burdwan, defendant." The decree was obtained against the same person described in the same manner, and the sale certificate set out the parties to the decree in the same terms. The plaintiff's case was that by the sale the property of the widow Benodini,

\* Appeal from Appellate Decree No. 2467 of 1886, against the decree of Baboo Mohendro Nath Mitter, Subordinate Judge of Burdwan, dated the 27th of August, 1886, reversing the decree of Baboo Raj Krishna Banerji, Munsiff of Cutwa, dated the 29th of June, 1885.

as heiress of her late husband, who was the original debtor, passed to him, that is, not only the interest of Benodini as widow, but the mortgaged property itself was sold for the debt of the deceased husband.

The defendants alleged that the decree under which the sale was held was fraudulently obtained. They denied that Ramnath had executed the bond, and also that Benodini Dabea, the minor widow, was represented in the suit at all, not having been properly made a party.

The Munsiff held that Ramnath had executed the bond, and the decree obtained by the plaintiff on the said bond was not invalid. He, therefore, decreed the plaintiff's suit for khas possession of the property purchased by him at the sale in execution of the decree.

The lower Appellate Court dismissed the suit upon the ground that the minor widow of Ramnath was no party to the original suit, and that, therefore, the sale held in execution of the decree did not pass the property that vested in her as the widow of Ramnath.

The plaintiff then preferred this second appeal to the High Court.

Baboo *Ashotosh Dhur* for the appellant.

Baboo *Nilmadhub Bose* (with him Baboo *Sharoda Churn Mitter*) for the respondents.

The following cases were cited and relied on at the hearing of the appeal: *Alim Buksh Fakir v. Jhalo Bibi* (1); *Newaj v. Muksud Ali* (2); *Guru Churn Chuckerbutty v. Kali Kissen Tagore* (3); *Hurdey Narain Sahu v. Rooder Perkash Misser* (4); *Durga Churn Shahu v. Nilmoney Duss* (5); *Suresh Chunder Wum Chowdhry v. Jugut Chunder* (6).

The judgment of the High Court (TOTTENHAM and NORRIS, JJ.), after stating the facts, proceeded as follows:—

- (1) I. L. R., 12 Calc., 48.
- (2) I. L. R., 12 Calc., 131.
- (3) I. L. R., 11 Calc., 402.
- (4) L. R., 11 I. A., 26; I. L. R., 10 Calc., 626.
- (5) I. L. R., 10 Calc., 134.
- (6) *Ante*, p. 204.

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Baboo Ashotosh Dhur for the appellant before us admits the informality of the plaint in that suit. He admits that technically the widow was no party to it; but asks us to hold that substantially she was a party and was bound by the decree, and that consequently the sale held in execution of that decree did pass the property to the plaintiff. He appears to rely to some extent on the hardship of the case in the event of the lower Appellate Court's decree being affirmed, because the mortgage debt was found to be true so far back as 1878, and it is now too late for the plaintiff to bring a fresh suit against the proper party.

We are unable to take any notice of the alleged hardship. The only question we have to decide is whether the lower Appellate Court was wrong in law. It appears upon the facts found that it is impossible to say that the Subordinate Judge committed any error. He found not only that the plaint as framed did not make the widow a defendant, but also that the mother Anundomoyee was not shown to have been ever appointed a guardian *ad litem* on behalf of the minor widow, or to have had permission to defend the suit on her behalf. Various cases were cited by Baboo Ashotosh Dhur in support of his contention. He referred us to *Alim Buksh Fakir v. Shulo Bibi* (1); *Newaj v. Muksud Ali* (2); *Guru Churn Chuckerbutty v. Kali Kissen Tagore* (3); *Hurdey Narain Sahu v. Rooder Perakash Misser* (4); *Durga Churn Shaha v. Nilmoney Dass* (5); and lastly *Suresh Chunder Wum Chowdhury v. Jugut Chunder* (6). Most of these cases appear to us to be not in point. They do not deal with the special case before us. *Guru Churn Chuckerbutty v. Kali Kissen Tagore* (3) is against the appellant's contention. It was there held that a decree in a suit where minors were defendants, and were not specifically named as defendants, would not bind the minors. The Full Bench decision cited by the appellant's pleader does to some extent seem to support the appellant's case, but there too the case is different. One of the defendants there was described as "Nitro Bashini Chowdhurani, guardian on behalf of her minor son,

(1) I. L. R., 12 Calc., 48.

(4) L. R., 11 I. A., 26; I. L. R., 10 Calc., 626.

(2) I. L. R., 12 Calc., 131.

(5) I. L. R., 10 Calc., 134.

(3) I. L. R., 11 Calc., 402.

(6) *Ante*, p. 204.

Suresh Chunder Wum Chowdhry." It appears that the lower Court in that case required the plaintiff to put in an affidavit to the effect that Nitro Bashini really was the mother and guardian of the minor Suresh Chunder, and after that the suit was registered and summons issued. It was held in that case "that, having regard to the orders of the Court and the allegations made in the plaint and written statement, the suit was substantially brought against the minor, and the error of description in the plaint being one of mere form, could not, without proof of prejudice, invalidate a decree against him in the suit." In the present case there were no such orders of the Court. The plaintiff of his own mere motion brought the suit against Anundomoyee, describing her as the mother and guardian of the late Ramnath Acharjee. Upon the findings come to by the lower Appellate Court we are compelled to hold that the decree of the Subordinate Judge dismissing the present suit, upon the ground that the minor widow was not affected by the previous decree, was correct.

The appeal is dismissed with costs.

H. T. H.

*Appeal dismissed.*

*Before Mr. Justice Tottenham and Mr. Justice Norris.*

LALJI SAHOY (ONE OF THE SURETIES) *v.* ODOYA SUNDERI MITRA  
AND OTHERS (DECREE-HOLDERS) AND ANOTHER (JUDGMENT-DEBTOR).<sup>a</sup>  
*Civil Procedure Code (Act XIV of 1882), s. 336—Surety, Liability of—  
Execution proceedings.*

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The liability of a surety under s. 336 of the Civil Procedure Code ceases when the proceeding taken in execution of a decree wherein the security was furnished comes to an end.

*D*, a judgment-debtor, was committed to jail on the 8th of August, 1884, and he applied under s. 336 of the Civil Procedure Code to be released. On the 16th of November, 1884, *B* and *C* stood security for him under the provisions of s. 336 of the Civil Procedure Code, that he would appear when called on, and that he would within one month apply under s. 344 to be declared an insolvent, and *D* was thereupon released. Instead of applying under s. 344 to be declared an insolvent he applied to have the decree, which

<sup>a</sup> Appeals from Orders Nos. 4 and 5 of 1887, against the orders of T. Smith, Esq., Judge of Gya, dated the 23rd of September, 1886, affirming the orders of Baboo Debendro Chunder Mukerji, Munsiff of Gya, dated the 5th of February, 1886.

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