APPELLATE CIVIL.

1909
July 6.

Before Mr. Justice Banerji and Mr. Justice Tudball.

MATA DIN AND OTHERS (DEFENDANTS) *v.* GAYA DIN (PLAINTIFF)*

Hindu Law—Mitakshara—Joint Hindu family—Decree for family debt—Position of minor member of the family not properly represented in the suit.

A Hindu family firm was sued for a debt contracted in the course of business by the firm. In execution of the decree in such suit a house belonging to the judgment-debtors was sold, and the sale was confirmed, but the purchaser did not get actual possession. One of the judgment-debtors, who was a minor, applied to have the decree set aside, and it was set aside as against him, but not so the sale. *Held* on suit by the son of the auction purchaser for possession of the house purchased by his father that the only plea tenable by the minor defendant was that the debt in respect of which the decree had been obtained was tainted with immorality or was otherwise not binding upon him. *Debi Singh* v. *Jia Ram* (1) referred to.

THE facts of this case were as follows :—

On the 9th of May 1903, Banni Ram and Raja Ram obtainedan *ex parte* decree against four defendants. In execution of the decree, the house in dispute was put up to auction sale and was purchased on the 5th of March, 1904, by the plaintiff's father, Pancham. Pancham got formal possession on the 12th of October, 1904, but on the same day the defendants forcibly dispossessed him and thereafter remained in possession. On February 7th, 1905, Chitrakoti, one of the defendants against whom the *ex parte* decree had been obtained, applied to have the decree set aside on the ground that he was a minor and had not been properly represented in the suit. On July 8, 1905, the *ex parte* decree was set aside and the suit was restored. At the rehearing he was again absent and a second *ex parte* decree was passed in the suit. Meanwhile Chitrakoti had applied under section 244, Code of Civil Procedure, 1882, to have the sale held in pursuance of the first *ex parte* decree set aside, but failed. In spite of the sale having become final the defendants continued in possession of the house. Hence the present suit for recovery of possession. The defence was that the sale to Pancham was a nullity, as the decree under which it had

* Second Appeal No. 571 of 1908, from a decree of S. R. Daniels, District Judge of Banda, dated the 1st of May 1908, reversing a decree of Chandi Prasad, Subordinate Judge of Banda, dated the 20th of December 1907.

(1) (1902) I. L. R., 25 All., 214.

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been held was afterwards set aside, and that Pancham was a mere *benamidar* on behalf of the decree-holders who had not obtained permission to bid.

The Court of first instance dismissed the suit, but the lower appellate Court decreed it. The defendants appealed to the High Court.

Pandit *Mohan Lal Nehru* (for Pandit *Moti Lal Nehru*), for the appellants :—The plaintiff suing for possession must show his title. The auction sale to Pancham conveyed no title to him, as the decree in execution of which the sale took place had not been properly obtained. Moreover, the decree was subsequently set aside and the sale held in pursuance of it became a nullity ; *Set Umedmal* v. *Srinath Ray* (1). The case of *Zain-ul-abdin* v. *Muhammad Asghar* (2) was not against the appellants. Where the decree-holder was the purchaser the sale would fall through when the decree was set aside. Here the appellants contended that Pancham was a mere *benamidar* for the decree-holder. The applicant Chitrakoti was not properly represented ; he was not a party to the suit and could not apply to set aside the decree ; *Hanuman Prasad* v. *Muhammad Ishaq* (3). Moreover, the order refusing to set aside the sale did not debar the appellants from resisting a suit for possession. In the present case they were in possession and unless some one could show a better title they could not be ousted. The principle of *Ghaziud-din* v. *Bishan Dial* (4) would also apply.

Dr. *Satish Chandra Banerji* (for Babu *Jogindro Nath Chaudhri*) for the respondent :—

Chitrakoti was a party to the *ex parte* decree and could not avoid it by showing merely that no formal order appointing a guardian *ad litem* for him was passed. The absence of such an order might be an irregularity, but was not an illegality ; *Walian* v. *Banke Behari Pershad Singh* (5), *Sridhar* v. *Ram Lal* (6), also F. A. F. O. No. 140 of 1908, decided on May 21, 1909.

He was quite right in applying under section 244, Act XIV of 1882, to set aside the sale. Even if the allegation about Pancham being a *benamidar*, which was then made and not substantiated, were true, the sale would not be void, but voidable,

(1) (1900) I. L. R., 27 Calc., 810.
(2) (1887) I. L. R., 10 All., 166, 172.
(3) (1905) I. L. R., 28 All., 137.
(4) (1905) I. L. R., 27 All., 443.
(5) (1903) I. L. R., 30 Calc., 1021.
(6) (1908) 5 A. L. J., 633.

and should be avoided by an application to the execution department; *Durga* v. *Kunwar* v. *Balwant Singh* (1), *Golam Ahad* v. *Judhister Chundra*, (2). It was too late now to raise pleas which had been overruled in the case under section 244; *Braja Nath* v. *Joggeswar* (3).

A sale in execution of a money decree is not affected by the subsequent reversal of the decree; *Zain-ul-abdin* v. *Muhammad Asghar* (4), *Shiv Lal* v. *Shambhu* (5).

The decision that Chitrakoti had not been properly represented does not operate as *res judicata*, first, because the present plaintiff or his predecessor was no party to those proceedings, and secondly, because those were only summary proceedings. Interlocutory orders passed in such proceedings do not bar the trial of an issue in a regular suit; 2 Black, *Law of Judgments*, section 691. 1 Van Fleet, *Former Adjudication*, 96-104. *Parsotam Rao* v. *Janki Bai* (6).

Even if Chitrakoti be deemed not to have been a party to the original *ex parte* decree, as the sale has taken place, he cannot resist the auction purchaser's title except by proving that the debt was immoral or otherwise not binding upon him; *Nanomi Babuasin* v. *Modhun Mohun* (7), *Debi Singh* v. *Jia Ram* (8).

The last was a case of sale in execution of a mortgage decree, but the principle that a sale *in invitum* against the father stands on the same footing as a voluntary sale made by him privately is fully applicable here, and the fact that the son is the defendant here does not affect it.

Pandit *Mohan Lal Nehru*, in reply contended that the decree was passed against the uncle and the father for a family debt and not against the latter alone. The principle upon which the son was liable for the father's debt did not apply to family debts. The point was not raised anywhere in the courts below. The appellants might have given evidence of immorality. It was not, however, for them to raise the point in the first instance: the respondent had first to prove that the debt was an antecedent debt. Chitrakoti was not suing to avoid the sale, and the rulings cited therefore did not apply.

(1) (1901) I. L. R., 23 All., 478.
(2) (1902) I. L. R., 30 Calc., 142.
(3) (1908-9) 9 C. L. J., 346, 349.
(4) (1887) I. L. R., 10 All., 166.
(5) (1905) I. L. R., 29 Bom., 435.
(6) (1905) I. L. R., 28 All., 109.
(7) (1885) I. L. R., 13 Calc., 21.
(8) (1902) I. L. R., 25 All., 214.

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BANERJI and TUDBALL, JJ.—This appeal arises out of a suit brought by the plaintiff respondent for possession of a house, which was purchased by his father Pancham at an auction sale on the 5th of March, 1904. The facts are these:—A suit was brought by Banni Ram and Raja Ram against four persons, namely, the defendants Mata Din, Ram Adhin, Ram Narain and Chitrakoti to recover money due on two hundis alleged to have been executed in favour of those plaintiffs on behalf of a firm of which the defendants were members. Chitrakoti is a minor, and in the suit he was described as represented by his father Ram Adhin as his guardian *ad litem*. The plaintiffs filed an application supported by an affidavit praying that Ram Adhin might be appointed guardian of the minor for the suit. Notice was issued to Ram Adhin to show cause, but he did not appear. The Court, however, does not appear to have recorded a formal order appointing Ram Adhin as guardian *ad litem* of the minor, but summons was issued to him as such guardian, and in a proceeding recorded on the date of the hearing he was described as guardian *ad litem* of the minor. The defendants did not appear, and on the 9th of May 1903, an *ex parte* decree was passed. In execution of that decree the property of the joint family, *viz.*, the house now in dispute, was sold by auction on the 5th of March 1904, and was purchased by Pancham, the deceased father of the present plaintiff. On the 12th of October 1904, he obtained formal possession. It is alleged that he was subsequently dispossessed by the defendants, who are now in possession. The defendants Mata Din, Ram Adhin and Ram Narain were prosecuted by Pancham, with the result that they were punished. We may observe that after the auction sale an application to set it aside was made by the three adult defendants on the ground of irregularity and on other grounds, but that application was rejected, and the sale was confirmed on the 21st of May, 1904. On the 7th of February 1905, an application was made on behalf of the minor Chitrakoti to have the *ex parte* decree set aside, and on the 8th of July 1905, the application was granted and the *ex parte* decree was set aside. On the 4th of August 1905 he applied to have the sale set aside on the ground that he was not properly represented in the suit. The Court of

first instance granted his application and set aside the sale, but on appeal the learned District Judge reversed the order of the Court of first instance and on the 17th of April 1906, dismissed the application and affirmed the sale. The suit of Banni Ram and Raja Ram was heard again, but it was not resisted, and on the 16th of January, 1906, an *ex parte* decree was again passed against all the defendants.

As the defendants are still in possession of the house purchased by the father of the plaintiff, the plaintiff instituted the present suit for recovery of possession. The claim was resisted on various grounds, the principal grounds being that the defendant Chitrakoti was not properly represented in the suit, no guardian *ad litem* having been appointed by the Court; that the decree passed in the suit and the auction sale held in pursuance of the decree were therefore invalid and were not binding on the minor, and that nothing passed to the purchaser under the said auction sale.

The Court of first instance dismissed the plaintiff's suit, but the lower appellate Court has decreed it. The learned Judge was of opinion that the order of the 17th of April, 1906, to which we have referred above, is binding on the defendants and that they are not entitled to plead that the auction sale was invalid.

The defendants have preferred this appeal. So far as the three adult defendants, namely, Mata Din, Ram Adhin and Ram Narain, are concerned the appeal is wholly untenable. The decree of the 9th of May 1903 was never set aside as against them. In pursuance of that decree the property in question was sold by auction and the sale was confirmed as against them, their application to have it set aside being rejected. The sale is therefore binding on them and on their interests in the property in question, and it is not open to them to resist the plaintiff's claim.

It is the case of the minor defendant Chitrakoti which has raised some difficulty. It is said that the decision of the District Judge, dated the 17th of April 1906, being a decision passed upon an application made by Chitrakoti under sections 244 and 311 of the Code of Civil Procedure, 1882, he is bound

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by that decision, and cannot impeach the sale which was held to be valid. This contention would have considerable force if Chitrakoti was properly represented in the suit in which the decree was passed and was thus a party to it. Unless he was a party to the suit he could not prefer any objection under section 244 or section 311. The question therefore arises whether he was a party to the suit. But holding the view that we do, we do not deem it necessary to decide that question. Assuming that he was not properly represented in the suit and was therefore not a party to it, is he entitled to claim that his interests in the property have not passed to the auction purchaser, unless he can establish that the debt for which the property was sold was of such a nature as not to be binding on him, and as would not justify a sale of the whole of the family property including his interests in it? It is contended on behalf of the plaintiff that if the debt was a debt for which the joint family was liable, the father of the appellant Chitrakoti, or the managing member of the family of which he and his father and uncles were members, was competent to sell the whole of the family property and such sale would convey to the purchaser the interests of the minor also; consequently if the debt for which the auction sale at which Pancham purchased was held was a debt binding on the family, the defendant Chitrakoti cannot resist the plaintiff's claim simply on the ground that he was not a party to the suit in which the decree obtained by Banni Ram and Raja Ram was passed. In our judgment this contention is well founded. If the debt was of such a nature that it was binding on all the members of the joint family, a sale in lieu of such a debt would bind all the members and convey the interests of the minor also. The mere fact that a decree was passed for such a debt in a suit to which the minor was not a party would not necessarily raise the inference that the debt was not binding on the minor. We have to see whether it was a debt for which the minor was liable. In the present instance, as we have said above, after the *ex parte* decree of the 9th of May 1903 was set aside, the case was reheard, but no defence was put in on behalf of Chitrakoti or any of the other defendants, and a decree was passed on the 16th of January 1906,

declaring the debt to be one for which all the defendants, including Chitrakoti, were liable. As was held by the Full Bench in *Debi Singh* v. *Jia Ram* (1), the Court in selling the property at auction does that which the judgment-debtor himself might or ought to have done, and therefore after an auction sale the son of the judgment-debtor cannot avoid the operation of the sale upon his interests unless he can prove that the debt was tainted with immorality, or was otherwise not binding on him. In our opinion the principle of the ruling in that case applies to this case. In his judgment the learned Chief Justice observed as follows :—

"If the purchasers at the sale in execution had purchased the property from Jia Ram and not through the Court, it is clear that the appellants could not upset the sale unless they were in a position to prove that the debt in respect of which the sale was effected was a debt tainted with immorality. The Court has done only what Jia Ram could himself have done. Are the purchasers under a judicial sale to be in a worse position than that which they would have occupied if they had purchased the property from Jia Ram? I think not."

In the present case if the father of Chitrakoti had sold the property in dispute for the amount of the decree obtained by Banni Ram and Raja Ram, the appellant Chitrakoti could not have recovered his share of the property from the purchaser save by proving that the debt for which the sale was effected was tainted with immorality and was not otherwise binding on him. The fact that an auction sale has taken place does not seem to us to make any difference. We are also of opinion that the fact that Chitrakoti is not a plaintiff, but is a defendant in the suit, does not make any difference. If he was not competent to bring a suit for the recovery of his own share in the property otherwise than by establishing that the debt was not binding on him, he is not entitled to resist the claim of the purchaser save on the grounds mentioned above.

For these reasons we are of opinion that the decree of the Court below is a right decree and the plaintiff is entitled to recover possession of the property purchased by his father. We dismiss the appeal with costs.

Appeal dismissed.

(1) (1902) I. L. R., 25 All., 214, 223.