1918

NAND LAL SINGH v. BENI MADHO SINGH.

the suit. They were as a matter of fact opposed to each other. Paragraph 15 of the written statement of Nand Lal Singh shows this clearly. Ram Lal Singh in no way contested the suit, whereas Nand Lal Singh did, and it is quite clear that the extra costs that were incurred in that suit were due to the action of the present plaintiff Nand Lal Singh alone. The case is very much like that of *Fakire* v. *Tasadduq Husain* (1). In this case there was no contract between the present parties. Each was in separate possession of property and there was nothing joint. Each was separately liable for the trespass that he had committed. Each trespass was committed separately, and each defendant's liability for mesne profits was entirely separate. The only thing common between them was that they were arrayed as defendants to the suit. We cannot find any equity in the present case that will enable us to hold that the respondent Ram Lal Singh is in any way liable to the plaintiff for a share of the costs that were recovered from him. The appeal is dismissed with costs to Ram Lal Singh.

It is to be noted that the action of the plaintiff is directed solely against Ram Lal Singh and not against the other respondents. This is clearly admitted before us in open Court.

Appeal dismissed.

REVISIONAL CIVIL.

Before Mr. Justice Ryves.

1918
June, 29.

BIHARI LAL (JUDGMENT-DEBTOR) *v.* BALDEO NARAIN AND OTHERS (DECREE-HOLDER).*

Civil Procedure Code (1908), *section* 115—*Revision—Jurisdiction of High Court—Question of law or fact bearing on jurisdiction of Court.*

When a question of jurisdiction is involved, the High Court is competent to revise a conclusion of law or fact which bears on such question.

Balakrishna Udayar v. *Vasudeva Ayyar* (2) explained.

THE facts of this case were as follows:—

A suit was filed against a minor, Bihari Lal, under the guardianship of his brother Gaya Prasad, and a simple money decree was passed against him for a sum of Rs. 238-15-0. In

* Civil Revision No. 50 of 1918.

(1) (1897) I.L.R., 19 All., 461. (2) (1917) I.L.R., 40 Mad., 798.

execution of that decree, house property belonging to the minor was attached and advertised for sale. The sale was fixed for the 14th of April, 1917. On the 13th of April, an application was made by Gaya Prasad as guardian of the minor for adjournment of the sale. The application was presented by a vakil of the Court under a vakalatnama signed by Gaya Prasad. In the body of the vakalatnama the name of the executant was left blank, but it was executed by Gaya Prasad, though he did not indicate when signing it that he signed as guardian of his minor brother. With the application, however, was filed an affidavit by Gaya Prasad which showed that he was acting in the matter as guardian of the minor. The Court granted an adjournment of the sale until the 20th of April ; but on that date the sale was held and the property was knocked down to a stranger for Rs. 180, very much less than its real value. On the 4th of May, 1918, application was made on behalf of the minor by the same vakil, under order XXI, rule 89, of the Code of Civil Procedure, and the proper amount was paid into Court within time. The Court of first instance rejected the application partly on the allegation of vagueness and want of compliance with the provisions of order XXXII, rule 5(1) of the Code of Civil Procedure, but mainly because it was not presented by anyone duly authorized to represent the minor. On appeal, the lower appellate court for the last-named reason affirmed the order of court below. The minor applied in revision to the High Court.

The Hon'ble Pandit *Moti Lal Nehru* and Pandit *Radha Kant Malaviya* for the applicant.

Mr. *W. Wallach*, Dr. *S. M. Sulaiman*, Mr. *Ibn Ahmad*, the Hon'ble Dr. *Tej Bahadur Sapru* and Babu *Sital Prasad Ghosh*, for the opposite party.

RYVES, J.:—The facts out of which this application arises are admitted. A suit was filed against a minor, Bihari Lal, under the guardianship of his brother, Gaya Prasad, and a simple money-decree was passed against him for a sum of Rs. 238-15-0. In execution of that decree, house property belonging to the minor was attached and advertised for sale. The sale was fixed for the 14th of April, 1917. On the 13th of April, 1917, an application was made by Gaya Prasad, as guardian of the minor,

1918

BIHARI LAL v. BALDEO NARAIN.

as ng for the adjournment of the sale. The application was put in by a vakil of the court under a vakalatnama executed by Gaya Prasad. In the body of the vakalatnama which is a printed document, and which is usually filled in by the vakil himself or his clerk, the name of Gaya Prasad was not entered. The document reads "I . . . appoint" so and so. It was executed by Gaya Prasad. Of this there is no question, but he did not add that he was executing it as the guardian of the minor. Along with this application there was filed an affidavit by Gaya Prasad. Taking the two together, it was quite obvious that the application for adjournment was being made by him as guardian of the minor through the vakil whom he had appointed to act for him. The court accepted the application to this extent that it granted an adjournment of the sale for six days, and the 20th of April, 1917, was fixed. On that date the sale was held and the property was knocked down to an outsider, *i. e.*, to a person who was no party to the suit, for a sum of Rs. 180, the opposite party here. It is admitted that the property was worth a very great deal more than what it was knocked down for. On the 4th of May, 1917, an application was made under order XXI, rule 89, by the same vakil. It purported to be tendered on behalf of the minor. The proper amount had been paid into court within the time allowed and the application must have been accepted by the court and the sale set aside unless the application was not in order. The court of first instance rejected the application in these terms :—"This application under rule 89, order XXI, of the Code of Civil Procedure has been presented by the applicant, who is a minor and it is not presented by a next friend. The minor's application was filed through a pleader who does not appear to have been retained by him, *vide* the vakalatnama. The application is against the provisions of rule 5 (1), order XXXII, of the Code of Civil Procedure and is also vague. No order can legally be passed on it without the minor being represented by a next friend. I therefore reject this application with costs." That is the order really in question here. The lower appellate court found, and rightly found, that the application in itself was not vague and that it entirely complied with order XXI, rule 89, but it held substantially for the same reason as the first

court that the application had not been properly presented on behalf of the minor, and rejected the application. From this order no appeal lies to this Court ; hence an application in revision.

Two arguments are raised against my interfering. First of all it is said, on the authority of *Balakrishna Udayar* v. *Vasudeva Ayyar* (1), and three recent rulings of this Court reported in I. L. R., 40 Allahabad, pages 425 and 612, and 16 A. L. J., page 535, that this Court has no power to interfere. It is said that the lower court had jurisdiction to go wrong and that, assuming it did go wrong, its decision is final. Secondly, it is argued on the merits that the decision on the point of law is correct.

It seems to me that, put in plain language, the court declined to hear the applicant. It declined to hear the minor himself, because of his minority, and it declined to hear the pleader because of a supposed defect in his vakalatnama. It seems to me that if the court was wrong in its reasons for not hearing the pleader and therefore not accepting the application, it declined to exercise a jurisdiction vested in it, or at least acted with material irregularity in the exercise of its jurisdiction.

There is one passage in the judgment of the Privy Council report in I. L. R., 40 Mad., 793, which, read by itself, and separated from the context and read without consideration of the facts of that case, does support the objection of the opposite party. It is the sentence which is reported at page 799, and runs as follows:—"It will be observed that the section (115) applies to jurisdiction alone, the irregular exercise or non-exercise of it or the illegal assumption of it." But the judgment does not end there, it goes on to say:—"The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved, and if the appellants' contention be correct, then, if the Civil Court should absolutely and whimsically decline to exercise its jurisdiction and refuse to make any orders as to the filling up of vacancies, no matter how many existed, there would not, in a case such as the present, be any remedy available under this section and no appeal would lie." In that case the District Judge purporting to act under a particular section of a particular Act, construing the section as he did, held that he had jurisdiction

(1) (1917) I. L. R., 40 Mad. 793.

1918

BIHARI LAL v. BALDEO NARAIN.

to pass a particular order, and passed it. Objection was taken to this order before the successor of the District Judge on the ground that the former District Judge had no jurisdiction to pass it. The court held that he had. An application was then made to the High Court of Madras in revision, and it was argued that the High Court had no power to interfere, one argument being that the decision of the court below was at the most a wrong decision on a point of law. The High Court repelled this objection and did interfere in revision, and the Privy Council upheld its decision. It seems to me what the Privy Council case decided was that the section (115 of the Code of Civil Procedure) is not directed against conclusions of law or fact *in which the question of jurisdiction is not involved.* (I think the words which I have italicized are most important.) It seems to me to follow from this that where a question of jurisdiction is involved this Court is competent to revise a conclusion of law or fact which bears on a question of jurisdiction. In the case before me it seems to me that on the point of law decided, a question of jurisdiction is involved, therefore I think I have jurisdiction to consider that point on the merits.

Three recent cases of this Court, however, are quoted in support of the objection. The first case is that of *Fazal Rab* v. *Manzur Ahmad* (1). On the face of it, that case looks very like the present case, but there the only point decided was that payment of money into the Treasury was not a payment into court within the meaning of rule 89, order XXI, and this Court held that, if that decision was a wrong one it could not be set aside in revision. There no question of jurisdiction was involved. In the next case (*Jhunku Lal* v. *Bisheshar Das*) at page 612 of the same volume, (2) also no question of jurisdiction was involved. In the last case, to which I was a party, a question of jurisdiction was involved. The case was decided only a very short time ago and I remember perfectly well that we did go into the merits and were satisfied that the order of the courts below in returning the plaint, was a proper order and one which the courts had jurisdiction to pass and should have passed. That case, therefore, in my opinion is not a helping guide. In that case no authorities were

(1) (1918) I. L. R. 40 All., 425. (2) (1918) I. L. R. 40 All., 612.

cited. I must confess that I had not then studied the Privy Council case in 40 Madras as carefully as I have since done, and I am inclined to think that perhaps our judgment was expressed unnecessarily broadly. It seems to me on full consideration that the Privy Council case gives me jurisdiction to go into the merits of the decision in this case on the point of law involved.

There is one other aspect of the case, which I think should not be lost sight of. The defects, if any, in the application or the power of attorney, were purely technical, and seeing that the property of a minor was at stake, I think, that if the court had doubts, it would have been well advised to have called evidence and ascertained whether the guardian had in fact authorized the vakil to make the application. I do not, however, base my judgment on this consideration, though in my opinion it has weight.

On the merits:—The application of the 4th of May, 1917, purported, as I have said, to be made by the vakil on behalf of the minor. There was no fresh vakalatnama, it is admitted, executed by the guardian of the minor authorizing the vakil specifically to file this application. It seems to me that no new vakalatnama was required for this particular application. The vakil had been appointed by Gaya Prasad to appear for the minor in a former stage of the litigation and also to put in the application of the 13th of April, asking for an adjournment of the sale in these very execution proceedings. If that appointment was a good appointment then it seems to me that it was still in force under order III, rule 4, of the Code of Civil Procedure. But it is argued that the vakalatnama executed by Gaya Prasad was not valid for two reasons. One was that the clerk of the vakil or somebody should have recorded in the body of the application, for a second time, the statement that it was Gaya Prasad who was making the appointment, and making it as guardian of the minor. As the vakalatnama runs, Gaya Prasad and no one else was making the appointment. It says so. "I . . . appoint". And although that vakalatnama was executed by Gaya Prasad, it is said to be invalid, as there was no statement in it to the effect that Gaya Prasad executed it as "guardian of the minor" or some such words. This seems to me a very technical objection. Except as guardian of the

1918

BIHARI LAL v. BALDEO NARAIN.

minor he had nothing whatever to do with the suit or the proceedings in execution. I have already said he himself came into court and made the application for the stay of the sale on the 13th of April, and put in an affidavit. The application showed that he had appointed the vakil to act for the minor of whom, he, Gaya Prasad, was the guardian. It seems to me, therefore, that the application of the 4th of May, was in order, and that the court has failed to exercise its jurisdiction in not accepting it because it came to a wrong decision on a point of law. Undoubtedly if it had decided, as I think it should have decided, it should have accepted the application. I, therefore, setting aside the order of the court below, pass the order which I think it should have passsd, *i. e.*, I direct that the money paid into court be made over to the purchaser and the sale be set aside. The applicant will have his costs throughout.

Application allowed.

APPELLATE CIVIL.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Ryves.

1918
July, 1.

LALA RAM (PLAINTIFF) v. THAKUR PRASAD (DEFENDANT).*

Civil Procedure Code (1908), *section* 60(c); *order XXI, rule* 92—*Execution of decree—Sale in execution—House of an agriculturist—Objection not taken at time of sale, but in answer to a suit for possession by the auction-purchaser—Estoppel.*

Held that a judgment-debtor, who could and ought to have raised objections to the sale of his property at the time of the sale, could not be permitted long after the sale had been confirmed to raise the same objections in answer to a suit by the auction purchaser for possession of the property purchased by him. *Umed* v. *Jas Ram* (1), *Pandurang Balaji Bagave* v. *Krishnaji Govind Parab* (2) and *Dwarkanath Pal* v. *Tarini Sankar Ray* (3) followed.

THE facts of this case were as follows:—

In execution of a decree obtained against one Thakur Prasad a house belonging to him was sold by auction on the 23rd of November, 1910. The purchaser obtained formal, but not actual, possession. He accordingly brought the present

* Second Appeal No. 1340 of 1916, from a decree of Piare Lal Katara, Subordinate Judge of Mainpuri, dated the 13th of April, 1916, confirming a decree of Prem Behari, Munsif of Mainpuri, dated the 25th of May, 1915.

(1) (1907) I. L. R., 29 All., 612. (2) (1908) I. L. R., 28 Bom., 125.
(3) (1907) I. L. R., 34 Calc., 199.