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plaintiff must have recourse to the court to get the property sold, and that nothing that the official receiver has done up to the date of suit has stood in his way of doing this. The official receiver is joined as a party in whom the property vests for the time being and not as the party who made a contract or was guilty of any breach of it. For the above reasons we think it would be unsafe in this case to hold that notice under section 80 was required.

Accordingly we dismiss appeal No. 18 of 1925 with costs. We allow appeal No. 496 of 1924 and direct that the charge shall be enforceable against the movable property entered in the inventory prepared by the official receiver or the sale proceeds thereof in his hands on the date of the decree of the court below in addition to the immovable property specified in the decree. The appellant in appeal No. 496 of 1924 will get his costs in this Court from the contesting defendant respondent.

Appeal No. 18 *dismissed.*

Appeal No. 496 *allowed.*

Before Mr. Justice Walsh and Mr. Justice Pullan.

1926 June, 25.

MAHADEO PANDE AND OTHERS (DEFENDANTS) *v.* SOMNATH PANDE AND ANOTHER (PLAINTIFFS) AND SALIG PANDE AND OTHERS (DEFENDANTS).*

Minor—Guardian ad litem—*Mortgage—Application for final decree for foreclosure—Name of minor's guardian wrongly entered—Suit to set aside decree.*

In a suit for foreclosure of a mortgage in which a minor defendant was interested the plaintiffs named the minor's father as his guardian *ad litem*. The minor's father, however, declined to act and the Nazir of the court was appointed

* Second Appeal No. 1854 of 1923, from a decree of Lal Gopal Mukerji, District Judge of Azamgarh, dated the 18th of October, 1923, modifying a decree of Ram Ugrah Lal, Subordinate Judge of Azamgarh, dated the 8th of August, 1922.

guardian. A preliminary decree for foreclosure was passed. When the decree-holders applied for the drawing up of the final decree, they named as the guardian of the minor, not the Nazir, but the minor's father, and notice was issued to the father for himself and as guardian of his minor son. A final decree was drawn up in which the minor's name was mentioned without any guardian being specified.

Held, on suit by the minor to have the final decree set aside, that the minor had not been prejudiced and was not entitled to the relief claimed. *Ram Barechha Ram* v. *Tarak Tiwari* (1) and *Kuber Upadhiya* v. *Ramakar Dat Upadhiya* (2), referred to.

THE facts of this case are fully set forth in the following order referring the appeal to a Division Bench :—

SULAIMAN, J. :—This is a defendants' appeal arising out of a suit for redemption. A mortgage by conditional sale, dated the 27th of June, 1888, was executed by Ramsaran, the grandfather of Somnath and the great-grandfather of Ranjit. In 1909, after the new Code of Civil Procedure had come into force, the mortgagees brought a suit for foreclosure and impleaded all the members of the family including the present plaintiff Somnath. Ranjit plaintiff was not even born then. The plaintiffs proposed to make Gaya, the father of Somnath, his guardian. It is not quite clear how the interest of Gaya was in any way adverse to Somnath, but Gaya apparently declined to act as guardian, with the result that the court appointed the Nazir of the court as the guardian of Somnath minor. The other members of the family compromised the claim, but an *ex parte* decree was passed against Somnath under the guardianship of the Nazir on the 25th of September, 1909. It is not suggested that there was any irregularity up to this stage in the proceedings.

(1) (1916) 14 A.L.J., 589. (2) (1924) I.L.R., 47 All., 357.

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In 1910 the mortgagees made an application for the preparation of a final decree for foreclosure but instead of impleading Somnath under the guardianship of the Nazir they impleaded him under the guardianship of his own father Gaya. Notice was issued to Gaya for himself and as guardian of his own son Somnath, but he did not object. A final decree for foreclosure was then prepared. But in this final decree Somnath's name was mentioned without the addition of any words like " under the guardianship of the Nazir or Gaya." Subsequently the mortgagees applied for formal delivery of possession and again impleaded Somnath under the guardianship of his father Gaya.

Now Somnath and his nephew Ranjit have brought this suit for redemption on the allegation that their rights have never been foreclosed. The court of first instance dismissed the suit but on appeal the learned District Judge has decreed it. In my opinion this case raises substantial questions of law which require determination by a Division Bench. There is authority for the proposition that in preparing a final decree it is not absolutely necessary to issue fresh notice to the judgement-debtor. When the time fixed for the preliminary decree for payment has expired the mortgagors run the risk of a foreclosure decree being prepared, *vide* the case of *Pandu Prabhu* v. *Juje Lobo* (1) and the case of *Tara Pado Ghose* v. *Kamini Dassi* (2). There is, however, an observation in the case of *Bibi Tasliman* v. *Harihar Mahto* (3) that the court itself has an inherent power to set aside an *ex parte* decree which had been passed without notice to the mortgagor. All these cases were under the Transfer of Property Act. The learned District Judge in this case has

(1) (1903) I.L.R., 27 Mad., 40. (2) (1901) I.L.R., 29 Calc., 644.
(3) (1904) I.L.R., 32 Calc., 253.

conceded that it was not absolutely necessary to issue notice. What, however, he has held is that the court decided to issue notice and did issue notice to Gaya and not to the Nazir. This, in the opinion of the learned Judge, amounted to an irregularity.

Another point mentioned is that in the final decree which was prepared, the name of Somnath alone was mentioned without the words "under the guardianship of the Nazir." This has been taken to mean that he was treated as a major and not a minor. This is said to be the second irregularity. *Sulaiman, J.*

The learned Judge has further held that inasmuch as Somnath has lost the right of redemption in consequence of the decree, he has been prejudiced by the irregularities.

The question whether the omissions mentioned above amount to irregularities is undoubtedly a substantial question of law.

As regard the question whether the minor has been prejudiced, it might ordinarily have been a question of fact, but the learned Judge has assumed that because the minor has lost his right of redemption, he has necessarily been prejudiced, whereas one might have supposed that the injury should be a consequence of the irregularity. No attempt apparently was made to show that if notice had been issued to the Nazir himself the amount would have been paid in time and the property redeemed. On the other hand, it rather seems that the only person who could have intervened or paid the money would have been Gaya, the father, to whom notice was actually sent. It may, therefore, be a question whether the plaintiffs have really been prejudiced by the absence of a notice issued to the Nazir. In two cases it has been held that in spite of the irregularity the minor defendant was not prejudiced, *vide*

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the case of *Ram Barechha Ram* v. *Tarak Tewari* (1), which has been followed in the case of *Kuber Upadhiya* v. *Ramakar Dat Upadhiya* (2).

I accordingly refer the case to a Bench of two Judges.

Munshi *Durga Prasad,* for the appellants.

Pandit *Narmadeshwar Prasad Upadhiya*, for the respondents.

THE judgement of the Bench was as follows :—

WALSH and PULLAN JJ. :—In our opinion this appeal must succeed. It seems to us, apart from authority, that the law is clear. It is not necessary to set out the facts, which can be gathered very clearly from the referring order of Mr. Justice SULAIMAN, and, if necessary, supplemented by the District Judge's judgement. Rules 2 and 3 of order XXXIV provide the machinery for enforcing mortgages by means of a foreclosure decree, and everyone agrees that no notice to the mortgagor between the preliminary decree and the final decree is prescribed. The reason for that is obvious. When a decree of a competent court has already decided that within six months the property which the defendant values will be taken away from him for ever, if he is not sufficiently interested in the subject to realize that unless he exercises his right of redemption within six months he will never have another chance, it is hardly likely that a piece of paper issued to him from the same court reminding him of what he already knows will make any difference to his mind. The authorities of *Pandu Prabhu* v. *Juje Lobo* (3) and the case of *Tara Pado Ghose* v. *Kamini Dassi* (4) cited by Mr. *Durga Prasad*, are merely examples making it quite clear that in the case of an ordinary

(1) (1916) 14 A.L.J., 589.
(2) (1924) I.L.R., 47 All., 357.
(3) (1903) I.L.R., 27 Mad., 40.
(4) (1901) I.L.R., 29 Calc., 644.

mortgagor *sui juris* no formal notice is necessary. We find nothing in the case of *Bibi Tasliman* v. *Harihar Mahto* (1), inconsistent with this view.

Mr. *Upadhiya*, for the respondents has rightly pointed out that these cases do not relate to minors. That is quite true. Different considerations arise in the case of minors. We have to see whether in a case applicable to a minor there is any evidence, if we are a court of fact, or if there is any finding, if we are a court of law, that his interests have been injuriously affected. We hold that there is no evidence of anything of the kind in this case, and that there is no real finding to that effect. The Nazir had been appointed as guardian for the litigant, and had acted up to the date of the preliminary decree because the father had refused. The suit had been compromised. The minor's interests were not distinct from the others. He was living with his father, and an indication to his father that the time had arrived for making a final decree would necessarily reach him if it concerned him to know. In our view the finding of the District Judge, which was undoubtedly intended to be a finding of fact, that the minor was prejudiced, stopped short of what is required by law. He holds that as the result of the irregularity the minor was deprived of his ancestral property. There are two fallacies in that sentence. He was not deprived in any other sense than everybody is deprived of anything with which he pays his just debts, and if a person owes Rs. 100 and pays Rs. 100, it is not a correct statement as a matter of law to say that he is prejudiced by the proceeding, and there was no connection between the failure to give the notice in this case and the order depriving the mortgagor of the ancestral property, because there was nothing to litigate, there was no proposal to redeem,

(1) (1904) I.L.R., 32 Calc., 253.

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no money was available for the purpose, and no effort, either within the time or outside the time, had ever been shown with a view to establishing that redemption was contemplated, and, therefore, the final decree was the result of the failure to issue notice. The result would have been just the same if the notice had been issued to the Nazir. We agree with what a member of this Court has already said in one of the cases relied upon by Mr. *Durga Prasad*, in the case of *Ram Barechha Ram* v. *Tarak Tewari* (1) :—" Where there has been an irregularity in the appointment of a guardian, the moment it is shown that there has been no fraud and that the minor's interests have not been prejudiced by the irregularity, the minor's right to set aside the proceedings must be denied." The same principle is applicable, not only to the appointment of the guardian, but to all the machinery relating to the appointment in respect of which the guardian stands in the shoes of the nominal litigant.

The appeal must, therefore, be allowed and the decree of the first court restored with costs here and below.

Appeal allowed.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Sulaiman.

1926 *June*, 28.

RAHIMA BIBI (PLAINTIFF) *v.* FAZIL (DEFENDANT).*

Muhammadan law—Divorce—Charge of adultery made by husband against wife—Retractation.

A Muhammadan wife, having been accused by her husband of adultery, sued in the court of a Subordinate Judge for dissolution of her marriage. The defendant denied (falsely) that he had ever made the charge complained of. During the course of the suit, however, he filed an application, in

* Second Appeal No. 229 of 1925, from a decree of K. G. Harper, District Judge of Benares, dated the 10th of November, 1924, reversing a decree of Man Mohan Sanyal, Subordinate Judge of Benares, dated the 11th of September, 1924.

(1) (1916) 14 A.L.J., 589 (596).