

Before Justice Sir Edward Bennet and Mr. Justice Verma

DWARKA HALWAI (DEFENDANT) *v.* SITLA PRASAD
(PLAINTIFF)*

1940
January, 18

Minor—Guardian ad litem—Gross negligence of guardian—Minor not properly and effectively represented—Ex parte decree against minor—Decree void and not merely voidable—Execution sale of minor's property on the strength of that decree, though not directly in execution of it—Suit by minor for setting aside the decree and the execution sale—Civil Procedure Code, section 47—Transfer of Property Act (IV of 1882), section 41—No application to auction sales.

Where the person appointed by the court as guardian *ad litem* of a minor defendant acts with gross negligence and does not properly and effectively represent the minor, the decree obtained against the minor is a nullity and void *ab initio*, and not merely voidable. If the minor's property be sold in execution of that decree the sale would be an invalid sale.

Where the decree in execution of which the property was sold was not itself void, but the sale took place on the strength of another decree in a declaratory suit which decided that the property was saleable in execution of the former decree as it belonged to the judgment-debtor of that decree and not to a certain claimant who had objected to the sale, and this latter decree was void because the claimant defendant who was a minor was not properly represented in this declaratory suit, it was *held* that the sale was invalid and the minor could sue to recover the property from the auction purchaser.

Where the minor has not been properly represented in the suit he is not a party to the suit in the proper sense of the term, and a suit by him to set aside the decree and the sale in execution of that decree is not barred by section 47 of the Civil Procedure Code.

There is no principle of law which applies to an auction sale the principle of section 41 of the Transfer of Property Act, and in the case of an auction sale held under a decree which is void the sale cannot pass the right, title and interest of the judgment-debtor.

In execution of *A's* decree against *M* a house was attached, and thereupon *S*, a minor, objected that the house was his,

*Second Appeal No. 1475 of 1936, from a decree of Sarup Narain, District Judge of Benares, dated the 18th of August, 1936, confirming a decree of Gopal Chand Sharma, Additional Civil Judge of Jaunpur, dated the 11th of November, 1935.

and this objection was allowed by the execution court. *A* then brought a suit against *S*, under order XXI, rule 63, for a declaration that the house belonged to *M*. In this suit a certain person was appointed guardian *ad litem* for *S*, but there was gross negligence on his part and he did not put in any appearance on behalf of *S*, with the result that the suit was decreed *ex parte* against *S*. After this the house was sold in execution of *A*'s decree against *M* and was purchased by *D*. On attaining majority *S* brought a suit against *A* and *D* in which he established his ownership of the house and claimed possession on the ground that the *ex parte* decree, and the sale in execution of the decree against *M*, were null and void against himself: *Held*, that *S* was entitled to succeed.

Mr. *Mukhtar Ahmad*, for the appellant.

Mr. *G. S. Pathak*, for the respondent.

BENNET and VERMA, JJ.:—This is an appeal by Dwarka Halwai defendant, originally an auction purchaser, against a decree in favour of the plaintiff. The present decree of the trial court is that the decree in Original Suit No. 188 of 1924, dated 24th September, 1924, of the court of the Munsif, Syed Ali Akbar *v.* Sitla Prasad and others, is null and void and is not binding on the plaintiff and the plaintiff shall receive possession over the house in dispute.

Syed Ali Akbar brought a suit No. 16 of 1922 and obtained a decree on a promissory note against Maksudan Das. Syed Ali Akbar attached a house in Shahganj, district Jaunpur, in execution of this decree. Mst. Ram Pati, the wife of Maksudan Das judgment-debtor, objected under order XXI, rule 58 of the Civil Procedure Code that her mother Mst. Shiyama Kunwar had built this house and that the house belonged to her on the death of her mother and that Maksudan Das had no interest in the house. Mst. Ram Pati then died and the present plaintiff Sitla Prasad, a minor, was substituted as the son adopted by Maksudan Das her husband and as the person who was entitled to succeed to the property of Mst. Ram Pati. The execution court decided the objection in favour of Sitla Prasad.

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Syed Ali Akbar then filed a suit, No. 188 of 1924, against Sitla Prasad minor for a decision that the house in question was the house of Maksudan Das. Syed Ali Akbar named Hanuman Prasad, the father of Maksudan Das, as the guardian *ad litem* of Sitla Prasad, but no notice was served on him and then Syed Ali Akbar applied to the court for the appointment of B. Ganga Saran, Vakil, and the court appointed B. Ganga Saran as the guardian *ad litem* of the minor defendant Sitla Prasad. We are also told that Syed Ali Akbar made a payment to B. Ganga Saran, Vakil, of the amount required for the defence of the minor. But no appearance was entered in the case by B. Ganga Saran, Vakil, on behalf of the minor and he did not contest the suit at all. Accordingly the suit was decreed *ex parte* against the minor on 24th September, 1924. Syed Ali Akbar then applied for attachment in execution of his decree in original suit No. 16 of 1922. There was attachment and sale on 2nd March, 1926, and the present appellant Dwarka Prasad purchased this house. Delivery of possession was granted to him on 3rd May, 1926. Some argument has been made to us that the plaintiff was entered as the legal representative of Maksudan Das in these execution proceedings and that in his present capacity as plaintiff in this suit those execution proceedings would be binding on him. One answer to this argument is that in the execution proceedings he was appointed to represent his father Maksudan Das and as legal representative of his father he did not represent himself in his personal capacity nor was he the legal representative of his deceased mother Mst. Ram Pati. In the present case the plaintiff claims this house as the property which he inherited from his mother. It is clear that his being entered in the execution proceedings as legal representative of his father can have no bearing on his right to claim property inherited by him from his mother. The court below notes, in regard to the argument of

Maksudan Das being represented by Sitla Prasad, that "This point does not appear to have been pressed in the lower court and there is nothing to show that Sitla Prasad was duly represented by a proper guardian in the execution proceedings", and therefore the court held that section 11 of the Code of Civil Procedure would not bar the present suit.

Various issues were raised before the courts below and agreeing with the trial court the lower appellate court has held: (1) The house belonged to Mst. Shiyama Kunwar and after her death to Mst. Ram Pati and not to Maksudan Das; (2) the plaintiff is the adopted son of Maksudan Das and the heir to his wife Mst. Ram Pati; (3) there was gross negligence of B. Ganga Saran, Vakil, guardian *ad litem* of the plaintiff; (4) the plaintiff was less than 21 years of age when the present suit was brought and therefore the suit is within limitation; and (5) section 41 of the Transfer of Property Act does not apply to auction sales as held in *Puran Mal v. Shiva Pal* (1); section 11 and section 47 of the Code of Civil Procedure do not apply.

The point which has been argued before us is that the appellant is an auction purchaser but was not the decree-holder in Original Suit No. 16 of 1922 and that the decree in that suit was merely voidable and not void *ab initio* and therefore it was a valid decree at the time of sale, and the mere fact that the plaintiff has now got that decree avoided is no reason why the sale should be set aside. No ruling has been shown precisely on the point alleged by the appellant. The appellant relies on *Zain-ul-abdin Khan v. Muhammad Asghar Ali Khan* (2). In that suit a judgment-debtor sued to set aside sales of his property in execution of the decree against him in force at the time of the sales, but afterwards so modified, as the result of an appeal to Her Majesty in Council, that as it finally stood it would have been satisfied without the sales in question having

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(1) [1934] A.L.J. 1260.

(2) (1887) I.L.R. 10 All. 166.

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taken place. It will be noted that in this case the decree was upheld by the Privy Council in appeal and the claim of the judgment-debtor was that the decree was so modified that a less amount of property sold would have been sufficient. It was under these circumstances that the Privy Council decided that the sale should be set aside so far as the purchases were made by decree-holders but the sales should not be set aside so far as they were made by persons who were not decree-holders. It is clear that this was a peculiar case and it was not a case of a sale on a decree where the decree was reversed by a superior court after the sale. This distinction has been pointed out in *Dayal Sarkar v. Tari Deshi* (1). The Privy Council case was not one in which the argument could have been made that the case was invalid because the decree under which it was held was subsequently set aside. The argument for the judgment-debtor was merely that under the ultimate decree a less amount of property might have been sold or should have been sold. It would appear that the rights of a judgment-debtor under such circumstances are sufficiently compensated by the payment to him of the surplus of the auction sale proceeds. The sale was set aside only as regards the decree-holders because they were parties to the suit. But the ruling does not appear to have any direct bearing on the case before us. Reference was also made by learned counsel for the appellant to a Full Bench ruling in *Siraj Fatma v. Mahmud Ali* (2). That was a Full Bench ruling where there was no issue referred to the Full Bench but the whole case was referred to the Full Bench. It was a somewhat peculiar case where defendants applied in the revenue court for partition of their shares. The plaintiffs were minors and were represented by their certified guardian and not by a guardian *ad litem*. The guardian objected that the defendants had no right in the property. A.

(1) (1931) I.L.R. 59 Cal., 647.

(2) (1932) I.L.R. 54 All. 646.

question of proprietary right was raised in the revenue court and the revenue court directed the guardian to file a civil suit within three months. The guardian failed to file the civil suit and as a result the revenue court decided the question against the plaintiffs and ordered partition. One of the plaintiffs on attaining majority instituted the civil suit for declaration of title to the property. It was held that the legal rights of the plaintiffs being absolutely clear, the failure of the guardian to file a civil suit as ordered by the revenue court prejudiced the interests of the minors and the guardian ceased to represent the minors properly and effectively and the minors were entitled to treat the partition order as not binding on them. On page 666 the ruling laid down: "It therefore follows that the real basis of the binding character of a decree against a minor is the fact of his having been represented by a proper person, and not the mere existence of any formal order appointing a guardian for him. Even when there is such an order, if the guardian does not properly represent him the decree would not be binding. On the other hand, even if there be any defect in the formal appointment of a guardian, the decree would be binding upon him if he is sufficiently represented and his interests are well protected." This passage shows that the Court was of opinion that even where there was an order appointing a person as guardian, if that guardian did not properly represent the minor the decree would not be binding on the minor. We understand that the Full Bench meant that such a decree would be void *ab initio* and not merely voidable. The court below therefore was correct in holding that this decree in Original Suit No. 16 of 1922 would be void *ab initio* and that being so the sale would be an invalid sale. There is no principle of law which applies to an auction sale the principle of section 41 of the Transfer of Property Act and in the case of an auction sale held under a decree which is void the sale

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cannot pass the right, title and interest of the judgment-debtor. In *Rashid-un-nisa v. Muhammad Ismail Khan* (1) it was laid down by their Lordships on page 582: "Section 244 of the Civil Procedure Code applies to questions arising between parties to the suit in which the decree was passed, that is to say, between parties who have been properly made parties in accordance with the provisions of the Code. Their Lordships agree with the Subordinate Judge that the appellant was never a party to any of these suits in the proper sense of the term. Her sister, Ulfat-un-nisa, was a married woman, and therefore was disqualified under section 457 of the Code from being appointed guardian for the suit, and Mauladad's interest was obviously adverse to that of the minor." The Court therefore held that the minor had not been properly represented in the litigation and that a suit by her to set aside decrees and sales which had taken place in execution of the decrees was not barred by section 244 of the Code of Civil Procedure. In *Hanuman Prasad v. Muhammad Ishaq* (2) it was held that the provisions of section 443 of the Code of Civil Procedure as to the appointment of a guardian *ad litem* for a minor defendant are imperative and where those provisions are not substantially complied with the minor is not properly represented and any decree which may be passed against him is a nullity. Learned counsel for the appellant relied on *Mukhoda Dassi v. Gopal Chunder Dutta* (3). It was held in that ruling that a mortgagor is not entitled to redeem the property which was purchased by a third party at a sale held in execution of an *ex parte* mortgage decree and confirmed whilst the *ex parte* decree was still in force though the said decree was set aside and subsequently re-affirmed after trial. It would be difficult to see on what principle the contrary could have been held and the ruling has no bearing whatever on the present case.

(1) (1909) I.L.R. 31 All. 572.

(2) (1905) I.L.R. 28 All. 137.

(3) (1899) I.L.R. 26 Cal. 734.

We consider that the decrees of the courts below were correct and we dismiss this second appeal with costs.

Before Mr. Justice Iqbal Ahmad and Mr. Justice Bajpai

ASHARFI SINGH (PLAINTIFF) v. CHANDRIKA PRASAD
KUARI (DEFENDANT)*

1940
January, 19

Specific Relief Act (I of 1877), section 54—Mandatory injunction—Fixed rate tenant—Constructing a temple on the holding—Act detrimental to, and inconsistent with the purpose of letting of, the land—Not an “improvement”—Agra Tenancy Act (Local Act III of 1926), sections 3(11), 109—Remedy by injunction and not ejection—Agra Tenancy Act, sections 84, 85(3)—Jurisdiction—Civil and revenue courts.

Where a fixed rate tenant is constructing a temple on his holding the landholder is entitled to a mandatory injunction for demolition and perpetual prohibition, under section 54 of the Specific Relief Act; the suit of the landholder is cognizable by the civil court and not by the revenue court.

A fixed rate tenant who puts his holding to a use which is inconsistent with the purpose for which the holding was let, or which is detrimental to the agricultural land, does an act which is in contravention of the original contract by which the plot was let out and is calculated to prejudicially affect the proprietary right of the landholder entitling him to realise the rent of the holding. In such circumstances the landholder must have the right to have the original contract respected and acted upon unless there is some law disentitling him to do so. Although by virtue of sections 77, 84 and 85(3) of the Agra Tenancy Act, 1926, the remedy of ejection of the fixed rate tenant in such a case is not available to the landholder, there is no provision of the Act barring or restricting a suit for injunction or compensation against the fixed rate tenant. Such a suit, therefore, lies in the civil court under section 9 of the Civil Procedure Code.

The building of a temple by a fixed rate tenant on his holding is not an “improvement”, as defined by section 3(11) of

*Second Appeal No. 2065 of 1937, from a decree of Manzoor Ahmad Khan, Additional Civil Judge of Benares, dated the 28th of October, 1937, reversing a decree of Brij Narain, City Munsif of Benares, dated the 30th of April, 1937.