

APPELLATE CIVIL.

Before Mullick and Kulwant Sahay, J. J.

ISHAN CHANDRA KUNDU

v.

NILRATAN ADHIKARI.*

1923.

March, 21.

Code of Civil Procedure, 1908 (Act V of 1908), Order XXXII, rule 7, and Order XXXIV, rule 5—Application for leave to compromise by guardian ad litem—no order passed—decree passed on compromise, effect of—Mortgage suit, compromise of, whether preliminary decree necessary—Chota Nagpur Tenancy Act, 1908 (Ben. Act VI of 1908), sections 46 and 47—Mortgage of raiyati interest prior to introduction of the Act—compromise decree passed on basis of the mortgage subsequently, validity of.

No particular formula is required to be used by the court in granting leave to a guardian *ad litem* to compromise a suit on behalf of a minor.

Therefore, when it is shewn that an application for such leave was made by the guardian and noted by the court, a decree passed on a compromise entered into by the guardian is binding on the minor. In such circumstances, it must be held that the leave of the court was expressly granted within the meaning of Order XXXII, rule 7, Civil Procedure Code, 1908.

Manohar Lal v. Jadunath Singh(1), applied.

Ramghulam Sahu v. Durga Prasad(2), distinguished.

A decree passed against a minor on a compromise for which the leave of the court was not expressly recorded is not void, but voidable at the option of the minor.

Therefore, so long as such a decree is not set aside in a proper proceeding, no objection to its validity can be taken in execution proceedings.

Virupakshappa v. Shidappa and Basappa(3), referred to.

* Miscellaneous Appeals Nos. 188, 192 and 204 of 1921, from an order of Babu Kamala Prasad, Subordinate Judge at Purulia, dated the 22nd August, 1921.

(1) (1906) I. L. R. 28 All. 585; L. R. 33 I. A. 128.

(2) (1921) 6 P. L. J. 190.

(3) (1902) I. L. R. 26 Bom. 109.

When a mortgage suit is compromised and the compromise petition expressly states that the decree shall be considered as final and absolute it is not necessary for the court to pass a preliminary decree under Order XXXIV, rule 4, before granting a final decree.

A consent decree in a mortgage suit directing payment by instalments is a valid decree and is not covered by Order XXXIV, rule 4, and when such a decree is passed it is not necessary to make a final decree under rule 5.

Bechu Singh v. Bicharam Sahu(1), followed.

Arunbati Kumari v. Ram Niranjana Marwari(2), referred to.

The Chota Nagpur Tenancy Act, 1908, was introduced in the district of Manbhum in December, 1908, and, therefore, sections 46 and 47 of the Act do not affect a mortgage of a *raiyati* interest executed in October, 1908, nor a compromise decree passed subsequently and based on the terms of the mortgage but directing the amount due thereunder to be paid in instalments instead of in a lump sum.

Narayan Ganesh Ghatate v. Bali Ram(3) and *Kusodhaj Bhakta v. Brojo Mohan Bhakta*(4), distinguished.

Appeals by the judgment-debtors.

The facts of the case material to this report were as follows :—

These three appeals were preferred by the judgment-debtors against two orders of the Subordinate Judge of Purulia, dated the 22nd August, 1921, disallowing their objections to the execution of a decree. The decree under execution was passed on the basis of a mortgage bond, dated the 4th of October, 1909, executed by Beni Madhava Kundu, Dina Nath Kundu and Ishan Chandra Kundu for a principal amount of Rs. 31,518-12-0, carrying interest at Rs. 7-8-0 *per cent. per annum*, and the properties mortgaged were the *raiyati* holdings of the mortgagors. A suit upon the basis of the above mortgage was brought in the year 1919, against the three mortgagors who were

(1) (1909) 10 Cal. L. J. 91.

(2) (1920) 58 Ind. Cas. 299.

(3) (1919) I. L. R. 46 Cal. 76.

(4) (1914-15) 19 Cal. W. N. 127A.

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defendants 1 to 3 in the suit and against Surja Kant De who was impleaded as defendant No. 4 on the allegation of his being a subsequent mortgagee. The defendant No. 1, Beni Madhava Kundu, died after the institution of the suit, and his three sons, Atul Chandra Kundu, Gokul Chandra Kundu and Lalit Mohan Kundu, were substituted in his place. Lalit Mohan Kundu was a minor and Babu Gokul Chandra Ghosal, pleader, was appointed as his guardian-*ad-litem*. The defendant No. 4, Surja Kant De, was also a minor and he was represented in the suit by his mother, Srimati Kishori Mohan Dasi, as his guardian-*ad-litem*. The defendants 1, 2 and 3 filed a written statement, but no written statement was filed on behalf of the defendant No. 4, although time was once taken by his guardian for the purpose. After various adjournments, the case was taken up on the 31st of March, 1920, when the defendants filed an application praying for time, as a talk of compromise was going on, and the Court adjourned the case to the next day with the direction that if the dispute was not settled amicably, the parties must be ready to go on with the case. On the next day, *i.e.*, on the 1st April, 1920, the plaintiffs and the defendants other than the defendant No. 4 filed a petition of compromise and Babu Gokul Chandra Ghosal, the guardian-*ad-litem* of the minor defendant, Lalit Mohan Kundu, filed an application for permission to compromise the case on behalf of the minor. There was no appearance on behalf of the defendant No. 4; the Court examined one witness and decreed the suit on compromise as against the defendants 2 and 3 and the heirs of the defendant No. 1, and *ex parte* as against the defendant No. 4. The terms of the compromise were that the suit was decreed for the total amount of Rs. 32,542-8-0, payable in twelve annual instalments from 1327 to 1328, B.S.; and it was provided that if any instalment be in default the amount of all the instalments would be considered as in default, and the plaintiffs would be entitled to realize the decretal amount, *i.e.*, the entire amount with interest at 6 per

cent. per annum, by execution of the decree and the sale of the mortgaged property. It was declared also that the mortgaged property would stand pledged for the satisfaction of the decretal amount, and the decree would be considered as final and absolute. No payment was made, and the decree-holder applied for execution of the decree, whereupon two petitions of objections were filed under section 47 of the Code of Civil Procedure; one on behalf of defendants 2 and 3 and the heirs of the deceased defendant No. 1; and another on behalf of defendant No. 4.

The principal objections raised by the defendants were (1) that there was no valid decree against the minor, Lalit Mohan Kundu, as there was no permission granted by the Court to his guardian-*ad-litem* to enter into the compromise on which the decree was made; (2) that the decree under execution being a mortgage decree could not be executed unless a final decree was passed; and (3) that the properties sought to be sold being part of *raiyyati* holdings could not be sold, under the provisions of sections 46 and 47 of the Chota Nagpur Tenancy Act. A further objection was taken by the defendant No. 4 to the effect that the execution could not proceed as no notice under Order XXI, rule 22, of the Civil Procedure Code was served upon him, the execution petition having been filed more than a year after the date of the decree.

The Subordinate Judge disallowed all the objections, except the last objection of the defendant No. 4, namely, that the execution could not proceed for want of a notice under Order XXI, rule 22, of the Civil Procedure Code. Appeal No. 204 was preferred on behalf of Lalit Mohan Kundu, the minor judgment-debtor; appeal No. 188 was preferred by the adult judgment-debtors; and appeal No. 192 was preferred by the defendant No. 4, the subsequent mortgagee.

C. C. Das (with him *S. S. Bose*), for the appellant in Appeal No. 188.

Baikuntha Nath Mitter, for the appellant in Appeal No. 192.

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P. C. Rai and *P. K. Mukerji*, for the appellant
in Appeal No. 204.

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Noresh Chandra Sinha and *Abani Bhushan Mukerji*, for the respondents.

KULWANT SAHAY, J. (after stating the facts as set out above proceeded as follows) :—

As regards the first objection, it is argued by the learned Vakil, for the appellant, that the compromise decree cannot be executed as against the minor, Lalit Mohan Kundu, inasmuch as the provisions of Order XXXII, rule 7, of the Code of Civil Procedure, were not complied with and no leave of the Court was granted to the guardian to enter into the compromise on behalf of the minor, and in support of his argument he has relied upon a number of rulings of the Privy Council as well as of the various High Courts. He argues that the decree, in so far as the minor is concerned, is a nullity and is incapable of execution. From the documents on the record it is true that it does not appear that any order was recorded in the order-sheet, granting leave to the guardian to enter into the compromise on behalf of the minor, but the fact that the attention of the Court was expressly directed to the fact that there was a minor concerned and that the compromise was being entered into on his behalf, is evident from the order of the 1st April, 1920, where it is expressly stated that the guardian of the minor defendant applied for permission to compromise the case on behalf of the minor, and there can be no doubt that the Court did apply its mind and sanction the compromise on behalf of the minor. Reliance has been placed by the learned Vakil, for the appellant, on the case of *Ramgulam Sahu v. Durga Prasad* (1), where it has been held by this Court that it cannot be inferred that the Court has, under Order XXXII, rule 7, of the Code of Civil Procedure, sanctioned a compromise from the mere fact that the petition of compromise gave notice to the Court that the interest of the minor

(1) (1921) 6 Pat. L. J. 190.

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parties was intended to be affected by the compromise, and that the Court passed a decree in accordance with the compromise. In that case a suit had been brought by one Gaya Prasad on his own behalf and on behalf of his minor sons for partition of joint family properties. That suit resulted in a consent decree passed on a petition of compromise, filed by Gaya Prasad. Subsequently another suit was brought by the minors for a partition of the same joint family properties ignoring the previous consent decree, and one of the questions raised was whether the previous consent decree operated as a bar to the plaintiff's right to maintain the subsequent suit. Their Lordships on a reference to the petition of compromise filed in the suit and the entire evidence on the record came to the conclusion that there was nothing in the petition to suggest that the minors were parties to the compromise. No doubt the compromise affected the interests of the minors, but as they were not parties to the compromise petition the Court would not be called upon to exercise its judgment on the question whether the compromise was for their benefit. No leave was asked for by the guardian-*ad-litem* to enter into the compromise on behalf of the minors and their Lordships were of opinion that the attention of the Court was not directed to the fact that there were minors whose interests were being affected by the compromise, and that the Court did not apply its mind as to whether or not the compromise was for the benefit of the minors. Their Lordships on the evidence in that case came to the express finding that there was evidence on the record suggesting an inference that the Court never intended to exercise its judgment on the question whether the settlement was for the benefit of the minors, and under those circumstances it was held that the compromise decree was not binding on the minors. In the present case before us, it is clear from the order-sheet that the attention of the Court was expressly drawn to the fact that the compromise was being effected on behalf of the minor inasmuch as a petition for leave to enter into the compromise was filed by the guardian and noted

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by the Judge. In order to attract the provisions of Order XXXII, rule 7, of the Code of Civil Procedure, it is enough to show that the attention of the Court was directly called to the fact that a minor was a party to the compromise and that the leave of the Court was obtained on petition or in some way not open to doubt. No particular formula is necessary to be used by the Court in order to grant the leave and when it is shown that an application was made by the guardian to the Court asking for leave to enter into the compromise and the Court makes a note of that application and passes a decree in terms of the compromise, it must be held that the leave of the Court was expressly recorded within the meaning of Order XXXII, rule 7, of the Code. This was the principle laid down by their Lordships of the Privy Council in *Manohar Lal v. Jadunath Singh* (1), and the case now before us comes directly within the principles so laid down.

Then, in the next place, it is to be noted that assuming that the leave of the Court was not expressly recorded that would not make the decree a nullity. It would only make the decree voidable at the option of the minor and, so long as it is not avoided in a proper proceeding, no objection can be taken in the execution proceedings as regards the validity thereof. Reference may be made in this connection to *Virupakshappa v. Shidappa and Basappa* (2).

The second objection raised on behalf of the appellant is that the decree under execution being a mortgage decree it could not be executed unless it was made absolute and a final decree for sale was passed. As I have already stated, the compromise petition upon which the decree was made, expressly stated that the decree will be considered as final and absolute (*vide* paragraph 4 of the petition, dated the 1st April, 1920). The suit was no doubt a mortgage suit and had there been no compromise the ordinary procedure laid down in Order XXXIV, Civil Procedure Code,

(1) (1906) I. L. R. 28 All. 585; L. R. 33 I. A. 122.

(2) (1902) I. L. R. 26 Bom. 109.

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would have been followed and a preliminary decree ought, in the first instance, to have been passed, and in that case it would be necessary to make a final decree at a subsequent stage. But this is a mere rule of procedure and it is always open to the parties to a litigation to waive a particular procedure and to agree to a final decree being passed without a preliminary decree being passed in the first instance. A consent decree, directing payment by instalments, is a perfectly valid decree and it is not covered by Order XXXIV, rule 4, of the Civil Procedure Code, and therefore it is not necessary to make a final decree under rule 5 of the said order. This view is supported by the judgment of their Lordships of the Calcutta High Court in *Bechu Singh v. Bicharam Sahu* (1). Reference may also be made in this connection to *Arunbati Kumari v. Ram Niranjani Marwari* (2). In my opinion, there is no substance in this objection and the learned Subordinate Judge was right in disallowing the same.

The third objection is based on the provisions of sections 46 and 47 of the Chota Nagpur Tenancy Act. Now, the mortgage in suit is dated the 4th October, 1909. The Chota Nagpur Tenancy Act was introduced in the district of Manbhum in December, 1909, and therefore, the mortgage of October, 1909, was not affected by the provisions of sections 46 and 47 of the Chota Nagpur Tenancy Act. But it is argued that the compromise was effected at a time when the Act was in force and it was by the compromise that the property now sought to be sold was mortgaged, and the present sale is based on the contract entered into in the compromise petition of the 1st of April, 1920. This argument proceeds on the assumption that the compromise was in effect a fresh contract which was the origin of the rights between the parties, and although it came into existence in consequence of the mortgage of 1909 yet for the purpose of enforcement and for the purpose of the application of sections 46

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and 47 of the Chota Nagpur Tenancy Act, this fresh contract must be taken to be the transaction between the parties which was the foundation of their rights. Reliance has been placed by the learned counsel on *Narayan Ganesh Ghatate v. Bali Ram* ⁽¹⁾ and *Kusodhaj Bhakta v. Brojo Mohan Bhakta* ⁽²⁾. But those cases have no application to the facts of the present case. In the first case it was held on a consideration of the facts of that case and on an interpretation of the conciliation award that the original mortgages and the decree based thereon were extinguished by the subsequent award which was duly registered and which had the same legal effect as an entirely fresh contract. In the second case all that was held was that a contract of parties is none the less a contract because there is superadded to it the command of a Judge. Here there was no fresh contract in the year 1920. The suit was based on the mortgage of 1909, and the decree was passed on the basis of that mortgage. On a true construction of the petition of compromise it cannot be held that a fresh contract of mortgage was entered into between the parties in 1920. What was intended was that the original mortgage of 1909 will stand, only payment was to be made by instalments as agreed to between the parties. In this view of the case, sections 46 and 47 of the Chota Nagpur Tenancy Act have no application to the facts of the present case.

The objections taken by the defendant No. 4, (who is the appellant in appeal No. 192) in the Court below, were, first that the decree could not be executed as no final decree in the mortgage suit had been made against him and that the execution could not proceed as no notice under Order XXI, rule 22, had been served on him. As regards the objection of there being no final decree it has already been held that the decree in execution is itself a final decree and no fresh final decree was necessary to be passed. The other objection, as regards the want of notice under

(1) (1919) I. L. R. 46 Cal. 76.

(2) (1914-15) 19 Cal. W. N. 1223.

Order XXI, rule 22, has been allowed by the Court below. In this Court a fresh objection was sought to be taken on behalf of this appellant to the effect that as he was not a party to the compromise petition no final decree could be passed against him. That may be so, but the decree as it stands is a final decree. It may be bad in law so far as he is concerned, but so long as it is not set aside in a proper proceeding, this defendant cannot be allowed to take the objection in the execution proceedings, and his objection taken for the first time here, in appeal, cannot be entertained.

The result is that all the three appeals must be dismissed with costs.

MULLICK, J.—I agree. In my opinion the Subordinate Judge did not violate the provision of Order XXXII, rule 7, of the Civil Procedure Code. The leave of the Court has been expressly recorded in the proceedings although there are no words expressly stating that the guardian is the grantee of such leave. *Manohar Lal v. Jadunath Singh* ⁽¹⁾ was decided in 1906, that is to say two years before the present Civil Procedure Code came into operation, and, in my opinion, the Code did not make any alteration in the law as interpreted by their Lordships of the Judicial Committee in that case. Their Lordships observed that there ought to be evidence that the attention of the Court was directly called to the fact that a minor was a party to the compromise and it ought to be shown by an order or petition or in some way not open to doubt that the leave of the Court was obtained. In the present case it has been shown in a manner not open to doubt that the leave of the Court was obtained.

I am further of opinion that even if the decree is bad on the ground that the leave of the Court was not taken, it is not a nullity and that it can not be avoided, except by a properly constituted proceeding. It cannot be called in question by way of objection to any proceeding taken in execution of it.

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With regard to the objection that the decree is a nullity because it was not made in accordance with the provision of Order XXXIV, of the Civil Procedure Code, in my opinion it was open to the parties to dispense with a preliminary decree; the making of a final decree payable in instalments was not illegal, much less was it a nullity, and in any event such a decree could not be challenged in execution proceedings.

Appeals dismissed.

REVISIONAL CIVIL.

Before Das and Macpherson, J.J.

JAIBAHADAR JHA

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April, 17.

Execution Sale—when completed—procedure to be observed—Code of Civil Procedure, 1908 (Act V of 1908), Order XXI, rule 84.

An execution sale, whether held in the immediate presence of the presiding officer of the court or not, is not complete until the presiding officer of the court has accepted the bid and declared the purchaser under Order XXI, rule 84. A mere order to close the bidding does not complete the sale even though the highest bidder is erroneously permitted to make the deposit required by rule 84.

The formal order declaring who has purchased the property put up for sale should be submitted for signature under rule 84 expeditiously, before the presiding officer rises for the day, and the presiding officer of the court, before signing the bid, should enquire from the persons present in court whether there is any advance on the highest bid given by the officer conducting the sale.

* Civil Revision No. 411 of 1922, from an order of Maulavi Aziz Ahmad, Munsif of Madhubani, dated the 16th November, 1922, in Execution Case No. 711 of 1922.