1883.

DUNDÁYA v. CHENBASÁPA.

otherwise notice of defendant's purchase, it is clear that the latter could derive no advantage from the registration of his mortgage.

We must, therefore, send back the case for the Judge to record a finding on the following issue, after taking such evidence as the plaintiff and defendant may wish to give, and having regard to the above remarks :—

Had the plaintiff notice of the defendant's sale, exhibit 3, when the mortgage (exhibit 32) was executed to him?

And send back the finding to this Court.

Case sent back.

APPELLATE CIVIL.

Before Sir Charles Sargent, Knight, Chief Justice, and Mr. Justice Nánábhái Haridás.

AKOBA DA'DA', MINOR, BY HIS MOTHER (ORIGINAL PLAINTIFF), APPELLANT, *v.* SAKHA'RA'M AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1885. *March* 11.

Minor—Suit against widowed mother alone how far binding on the minor—Parties—Representation—Sale of equity of redemption—Mortgage—Redemption.

A widow does not represent the estate so as to bind the son when the existence of the minor son is, from whatever cause, altogether ignored, and there is nothing on the face of the proceedings to show that she is sued as representing the minor son.

Accordingly where the plaintiff, a minor, sought to redeem a certain property from the defendant who had purchased the equity of redemption at an auction sale in execution of a decree obtained against the plaintiff's mother alone as representative of her deceased husband,

Held, that the plaintiff was entitled to redeem. The plaintiff having been ignored, the inheritance had not been substantially represented in the suit against his mother alone, and the plaintiff's right to the equity of redemption consequently remained unaffected by the sale to the defendant.

THIS was a second appeal from the decree of R. F. Mactier, District Judge of Sátára.

The plaintiff, a minor, by his mother and as next friend sued to redeem certain land which had been mortgaged by his deceased father, Dáda, for Rs. 600 to the father of the first defendant. The plaintiff alleged that the debt had been paid off.

* Second Appeal, No. 4 of 1883.

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The defendant alleged that he had bought the equity of redemption at an auction sale in execution of a decree against the father of the plaintiff. It appeared that the plaintiff's father, (Dádá), was not alive when the suit was brought in which the said decree had been obtained. That suit had been brought against the plaintiff's mother alone as representative of her husband, Dádá, apparently in ignorance of the existence of the plaintiff.

The Subordinate Judge of Sátára held that, by the sale of the equity of redemption, the entire interest of Dádá passed to the defendant; and that the plaintiff, though not a party to the suit, was substantially represented. He, therefore, rejected the plaintiff's claim.

The plaintiff appealed, but the District Judge confirmed the lower Court's decree.

The plaintiff preferred a second appeal to the High Court.

Ghanashám Nilkant Nádkarni for the appellant.

Ganesh Rámchandra Kirloskar for the respondents.

SARGENT, C. J.—The plaintiff, who is a minor, by his mother as next friend claims to recover possession of land which, he says, had been mortgaged by his father Dádá to Harichand, the father of the defendants, and which mortgage, he alleges, has since been paid off. The defendant Sakhárám claims to have bought the equity of redemption at an auction sale in execution of a decree obtained by Harichand against Dáda. The District Judge held that the entire interest of Dádá in the equity of redemption passed under the sale, and dismissed the plaintiff's claim.

It appears that Dádá was not alive when the suit, (170 of 1871), was instituted, in which the equity of redemption was sold, and that it was brought against Dádá's widow alone as representing Dádá, apparently in ignorance of the existence of Dádá's son. It was contended, however, that the plaintiff, although not a party to that suit, was substantially represented in it, and that the entire interest of Dádá passed to the auction-purchaser. In support of that contention the cases of *Ishan*

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Chunder Mitter v. *Buksh Ali Soudágur*(1); *General Manager of Raj Darbhánga* v. *Mahárájáh Coomár Ramáput Singh* (2); and *Sotish Chunder Lahiry* v. *Nil Comul Lahiry*(3) were relied on. In the first of these cases it is to be observed that the plaint itself mentioned the existence of the minor son as being under the guardianship of the widow, and the widow was sued as the person in whose possession the property was. The widow was, therefore, sued in her representative capacity. In the case in Moore's Indian Appeals, the minor as well as the widow had been made parties to the suit of 13th April, 1865, in which the decree was passed. The widow was the registered proprietor of the estates of her deceased husband, and an order was made by that decree that the above estates should be put up for sale. In execution of that decree the estates were advertised for sale by the Collector; but the certificate of sale mentioned only "the right, title, and interest of the widow" as having been sold. Under these circumstances the Privy Council, remarking that the case did not substantially differ from the case in Marshall's Reports, held that, if the whole proceedings were fairly looked at, "it showed that the estate of the deceased debtor was sold," and that the "proceedings were substantially a bar to any claim by the son."

These cases doubtless establish that when the minor son is substantially before the Court, and the proceedings show a clear intention on the part of the Court making the decree to bind the entire estate which is subject to the debt, no mere technical or formal objection will be allowed to prevail against giving full effect to the decree. But they do not go the length of saying that a widow represents the estate so as to bind the son, when the existence of the minor son is, from whatever cause, altogether ignored, and there is nothing on the face of the proceedings to show that she is sued as representing the minor son. In *Jatha Naik* v. *Venktápá*(4) this distinction was taken. There a decree had been obtained *ex parte* against the widow of the deceased debtor, which was set aside after her death on the

(1) Marsh. Rep., 614.
(2) 14 Moo. I. A., 605.
(3) I. L. R., 11 Calc., 45.
(4) I. L. R., 5 Bom., 14.

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application of the sister of the deceased debtor who was placed on the record; and a decree was ultimately passed against the latter in favour of the judgment-creditor, and an order made that, in default of payment by the defendant of Rs. 300 and costs, the plaintiff should recover that amount from the mortgaged premises, and the Court, (consisting of Sir Michael Westropp and Mr. Justice F. D. Melvill), held that the inheritance was not substantially represented so as to bind the son, who was a minor at the time, inasmuch as the existence of the minor son was ignored throughout the proceedings in that suit.

In the present case the plaintiff has been, as a fact, whatever the reason for it may have been, ignored throughout the proceedings in Suit 170 of 1871. The inheritance cannot, therefore, in our opinion, be said to have been substantially represented in that suit, and the plaintiff's right to the equity of redemption consequently remained unaffected by the auction sale to Sakhárám; and he is now entitled to redeem the mortgage, or to recover possession of it, if, as he alleges, the mortgage has been already satisfied.

We must, therefore, reverse the decree, and send the case back for trial subject to the above remarks. Plaintiff's costs throughout up to the present time to be borne by Sakhárám.

Decree reversed.

APPELLATE CIVIL.

Before Mr. Justice Nánábhái Haridás and Sir W. Wedderburn, Bart., Justice.

1885. *March* 18.

HARI BHIKA'JI, APPLICANT, *v.* NA'RO VISHVANA'TH, OPPONENT.*

Extraordinary jurisdiction—Res judicata—Code of Civil Procedure (Act XIV of 1882,) Sec. 622.

A wrong decision on a question of *res judicata* is not a subject for the interference of the High Court under section 622 of the Code of Civil Procedure, Act XIV of 1882.

THIS was an application for the exercise of the High Court's extraordinary jurisdiction under section 622 of the Code of Civil Procedure, Act XIV of 1882.

* Extraordinary Civil Application, No. 43 of 1884.