

(1935) 06 BOM CK 0005
In the Bombay High Court

Kedar Nath Goenka

APPELLANT

Vs

Munshi Ram Narain Lal

RESPONDENT

Date of Decision : 04-06-1935

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11
Limitation Act, 1908 — Article 12

Citation : (1935) 37 BOMLR 794

Hon'ble Judges : Shadi Lal, J;John Wallis, J;Atkin, J

Bench : Full Bench

Final Decision : Allowed

Judgement

John Wallis, J.—In this case the right of a judgment creditor to bring the properties of a mutt to sale in execution of a money-decree against the Mahanth of the mutt has for more than a quarter of a century been the subject of incessant litigation and a multiplicity of suits in the Courts below, and now comes before this Board for the first time. In 1898 the Mahanth of the Suja Mutt died and was succeeded by Siaram Das, the judgment-debtor in this case. A few months later in January 1899 the Mahanth of the neighbouring Sersia Mutt, as next friend of his nephew, Mahabir Das, who is said to have been six years old, instituted a suit in the Court of the Subordinate Judge of Monghyr against Siaram Das to establish the minor's right to succeed to the office of Mahanth of the Suja Mutt, and according to his own statement spent a sum far in excess of Rs. 31,000 in prosecuting the suit. One of his first steps after instituting the suit was to apply for the appointment of a receiver, who on his appointment took possession of the mutt properties, with the result that the defendant Siaram Das was left without any funds wherewith to defend the suit. He then applied to a money-lender Baijnath Goenka (the father of the present plaintiff Kedar Nath Goenka) who undertook to advance him a sum of Rs. 20,000 for the purposes of the litigation in consideration of his executing an ekrarnama undertaking to pay one lakh of rupees and to give a lien for that sum on the mutt properties. Not content with this, he subsequently obtained a further ekrarnama giving him a

zari-peshgi lease of certain mutt properties for fifteen years in lieu of interest on the above sum.

2. The Subordinate Judge dismissed the minor's suit on the ground that he had no title to succeed to the mutt, and also recorded a finding that the defendant was in. the same case. From this decree both parties appealed to the High Court at Calcutta, While the appeals were pending, the minor plaintiff by his next friend Surjao Das, Mahanth of the Sersia Mutt, and Siaram Das, the defendant, presented a petition to the High Court, stating that the parties had propromised the suit on the terms that they were both to be Mahanths and to be entitled to and in possession of the mutt properties in equal shares, and on the further terms that Surajao Das was to have a first charge on the mutt properties for Rs. 31,000 which he had spent in prosecuting the suit on the plaintiff's behalf, and that, as the Suja and Sersia Mutts had a common founder and the Suja Mutt had been in the habit of subsidising the Sersia Mutt, both parties were to give the Sersia Mutt a lease of the Suja Mutt properties, yielding a net income of Rs. 1,500. About this compromise it is sufficient to say that on this petition the High Court passed an order sanctioning the compromise as beneficial to the minor plaintiff, and ordered and decreed that the parties should abide by it.

3. On November 30, 1903, Baijnath Goenka filed in the same Court, O. S. 500 of 1903, the suit out of which the present litigation has arisen to recover Rs. 1,17,607-3-0 on the ekrarnamas mentioned above, impleading the two Mahanths Siaram Das and Mahabir Das as defendants Nos. 1 and 2. Of this sum Rs. 87,042 was for interest, and in lieu of interest on this interest he claimed under the zaripeshgi lease possession and enjoyment of the rents and profits of the mutt properties mentioned in the second ekrarnama for fifteen years, and to be paid the principal on the expiration of the lease. The balance of Rs, 30,565 he claimed to recover by sale of the mutt properties on which he had a lien under the first ekrarnama, and also from the person and properties of defendant No. 1.

4. As was only to be expected, both the Subordinate Judge and the High Court on appeal held these ekrarnamas to be grossly unconscionable and void. As regards the Rs. 14,590-4-6, which the plaintiff was found to have advanced under the void ekrarnamas, both Courts held that not having intended to act gratuitously, he was entitled to repayment of that sum with reasonable compensation. The High Court reduced the rate of interest awarded by the lower Court, and the plaintiff obtained a decree for Rs. 22,073 against Siaram,, defendant No. 1, and the suit was dismissed as regards Mahabir, defendant No. 2. In execution of this decree Baijnath Goenka, the decree-holder, brought to sale Siaram's eight annas share in the mutt properties, and at the Court-sale held on January 18 and 21, 1908, himself became the purchaser of the properties which are the subject of the present suit.

5. On the application of Siaram, the judgment-debtor, the Subordinate Judge set aside the sale as not in accordance with the provisions of the Transfer of Property Act as regards" the sale of mortgage property. There was an appeal to the High

Court which after referring the question to a full bench on February 4, 1913, reversed the Subordinate Judge's order setting aside the Court-sale, and remanded the case to the lower Court to proceed with the execution of the decree.

6. While this appeal to the High Court was pending, Siaram, the judgment debtor, had been removed in 1910 from the office of Mahanth and Mahabir appointed sole Mahanth by a decree in a suit instituted by three chelas of the-mutt for the removal of both Mahanth's, and confirmed by the High Court on appeal in 1912. The ground of removal was not personal misconduct but mismanagement. The relations of the two Mahanth's were then friendly, and Siaram, who may not have been sorry to be relieved of office in view of his embarrassments, showed so little interest in defending the suit that the question whether the suit was collusive was considered by both Courts but was held not to be proved.

7. After his removal from office Siaram continued to contest the decree-holder's appeal to the High Court against the order setting aside the Court-sale ; but after the order had been set aside and the case remanded, he failed to appear to the notice to attend with his witnesses on May 5, 1913. The order sheet under that date states that the case had come back to be tried on the merits, that the judgment-debtor did not appear and that notice of service was proved. The Subordinate Judge accordingly passed the following order :

The objection of the judgment-debtor is dismissed. The sale to be confirmed, and the case to be dismissed on full satisfaction." It is on the title acquired by this confirmation that the present suit has been brought. Mahabir, the present defendant No. 1, on whom Siaram's office had devolved, has been found by the Subordinate Judge in the present case to have had notice of the order of remand, but made no attempt to set aside the confirmation and revive and continue the proceedings for setting aside the Court-sale on the grounds which had not been disposed of by the High Court on appeal.

8. Siaram Das having died, Mahabir was brought on as his legal representative in the execution proceedings. On July 28, 1917, the judgment-creditor obtained an order, confirmed on appeal on May 27, 1918, that the other auction purchasers should re-deposit the purchase monies which they had been allowed to withdraw on undertaking to return them, should the order setting aside the sale be reversed.

9. Two of these auction-purchasers then instituted separate suits, Nos. 477 and 478 of 1918, which were tried together, against Kedar Nath, the present plaintiff as representative of the decree-holder and Mahabir, the present defendant No. 1, as the Mahanth in possession of the mutt properties, for a declaration that the plaintiffs were not bound to re-deposit the purchase monies on the grounds that the Court-sale was invalid and the Mahanth would not allow them to take possession of the properties they had purchased. In their Lordships' opinion it

was clearly necessary to decide in these suits the dispute as to the validity of the Court sale between the present plaintiff and defendant No. 1, then arrayed as co-defendants, for the purpose of giving the plaintiffs appropriate relief. The Mahanth as defendant No. 2 sided with the plaintiffs, and on the appeals to the High Court from the decrees in the plaintiffs favour was represented by the same counsel as the plaintiffs.

10. The High Court allowed the appeals, reversed the decrees of the Subordinate Judge and directed the plaintiffs to deposit the purchase money in Court Das J., who delivered the judgment of the Court, held that Siaram Das where he borrowed money from the plaintiff in the suit was the Mahanth of the mutt, that he had power to sell or mortgage the mutt properties for the necessary purposes of the mutt, and that money borrowed to enable him to defend his title to the office of Mahanth was such a necessary purpose. He was entitled to sell or mortgage the mutt properties for this purpose, and, if he could do so voluntarily, the mutt properties could be brought to sale in execution of the decree against him for the borrowed money.

11. Ignoring this adjudication, when the plaintiff in one of the suits just mentioned! took steps to obtain possession of the properties he had purchased at the Court-sale, the Mahanth Mahabir Das brought another suit to contest his right to obtain delivery of possession which was compromised. Further, after Kedar Nath had applied to recover possession in execution of the properties now in suit which his father, the decree-holder, had purchased at the Court-sale, the Mahanth Mahabir Das filed another suit to restrain him by injunction from proceeding with the execution, but allowed this suit to be dismissed for default after Kedar Nath's application had been dismissed as time-barred on August 4, 1925.

12. The foregoing narrative brings the history of this litigation down to the institution of the present suit, O. S. 22 of 1925, in which the plaintiff Kedar Nath Goenka sued the Mahanth Mahabir on the title acquired by his father Baij-nath, the decree-holder, as auction-purchaser of the suit properties on the confirmation of the Court-sale in May, 1913. The suit once more raised the issue as to the validity of the sale of the mutt properties in execution of the decree, and the 13th issue was, whether the decisions in suits Nos. 477 and 478 of 1918 (the suits of two other auction-purchasers) are binding on the defendant. The Subordinate Judge held that the issue as to the validity of the sale was not res judicata between the plaintiff who was defendant No. 1 and the Mahanth who was defendant No. 2 in these suits, because the plaintiffs who were the auction-purchasers of other properties at the Court-sale had not sought for any relief as against the Mahanth who was defendant No. 2, but this ruling was given before the recent decisions of this Board as to res judicata between co-defendants which will be referred to later.

13. On the merits, the Subordinate Judge held that the Court-sale was valid on much the same grounds as were given by Das J. in the judgment already

mentioned, and gave the plaintiff a decree. From this decree the Mahanth defendant No. 1 and defendant No. 3, who was in possession of some of the suit properties, preferred appeals to the High Court at Patna. The learned Judges of the High Court allowed the appeal of defendant No. 1, reversed the judgment of the lower Court and dismissed the plaintiff's suit without going into any other question, on the short ground that the suit was barred by res judicata under Explanation V of Section 11 of the Code of Civil Procedure, as in O. S. 500 of 1903 the plaintiff had prayed for the recovery of the money sued for by sale of the mortgaged properties and also, if necessary, by the sale of the other mutt properties, and the latter relief not having been granted must be deemed to have been refused. From this decree the plaintiff preferred this appeal to His Majesty in Council. Defendants Nos. 1 and 3 who-were the appellants to the High Court have remained ex parte, but defendant No. 2, a transferee from defendant No. 1 subsequently to the confirmation of the Court-sale, has appeared in support of the judgment of the Court below.

14. The Lordships are unable to concur in the reasons given by the High Court for dismissing the suit. The plaintiff's claim in O. S. 500 of 1903 and the reliefs which he sought were based solely on the ekrarnamas which were held by both Courts to be unenforceable and void. On their being found to be void by both Courts, the plaintiff was held to be entitled to recover the monies which he had advanced, and he obtained a decree against defendant No. 1 the Mahanth Siaram, to whom the advances had been made.

15. In their Lordships' opinion there is no reason to suppose that it was intended to give the plaintiff a worthless decree against an ascetic who presumably had no property of his own and to deprive the plaintiff of any right he might have to bring the mutt properties to sale in execution of the decree. Further, the learned Judges in the High Court appear to have entertained no doubt as to the right of the Mahanth to raise money for the defence of the suit brought against him by sale or mortgage of the mutt properties, because, as showing the unconscionable nature of the ekrarnamas, they observed that defendant No. 1, Mahanth, was not a mere beggar and that the security given by him (which consisted of mutt properties) was ample to cover the advances which the plaintiff was undertaking to make.

16. Although in the judgment under appeal the learned Judges have not dealt with the issues in the case, their Lordships consider it unnecessary to remand the case to the High Court for findings on those issues and so further prolong this ruinously protracted litigation, because in their opinion the question of the validity of the Court-sale," the only serious issue in this case, was directly and substantially in issue between the plaintiff and defendant No. 1 in suits Nos. 477 and 478 of 1918 in which they were co-defendants. In their Lordships' opinion, as already stated, it was necessary in those suits to decide the dispute between them as to the validity of the Court-sale for the purpose of giving the plaintiffs appropriate relief, and therefore this case is governed by the rule as to res

judicata between co-defendants in *Cottingham v. Earl of Shrewsbury* (1843) 3 Hare 627, which has recently been applied by this Board in (1931) ILR 53 103 (Privy Council) and *Maung Sein Done v. Ma Pan Nyun* (1932) L.R. 59 IndAp 247 : 34 Bom. L.R. 1040.

17. In the latter case it was observed by their Lordships that it was immaterial whether K., one of the two defendants, had entered appearance or contested the suit, for she was a proper party and had a right to be heard if she so desired. Here, as already stated, defendant No. 2, the Mahanth Mahabir, entered appearance and sided" with the plaintiffs. In the present suit the same question as to the validity of the sale is again in issue between these same defendants, who are now ranged as plaintiff and defendant No. 1, though the subject-matter of this suit is different, and the decision in the former suits is binding upon them. That issue being *res judicata* in the plaintiff's favour, he is entitled to sue within the period prescribed by the law of limitation on the title he acquired when the Court-sale to his father of these properties was confirmed and on confirmation became absolute.

18. Defendant No. 3, Ram Narayan, preferred a separate appeal to the High Court claiming an independent title to some of the suit properties under a purchase at a sale for arrears of land cess on July 6, 1914, subsequently to the Court-sale, The High Court allowed the appeal on the ground that the suit was barred under Article 12 of the Indian Limitation Act, as the plaintiff had not sued to set aside the sale for arrears of road cess within the time prescribed. The bid-sheet A. A. shows what was sold was the property exclusively belonging to the judgment-debtor as detailed below, viz., Mahanth Mahabir Das. At the time of this sale the title to the property sold was not in that judgment-debtor but in the plaintiff, and their Lordships agree with the decision in *India in Jwala Sahai v. Masiat Khan* I.L.R(1904) All. 346, that the sale was a nullity, and that the present suit is not barred under Article 12 of the Indian Limitation Act. For these reasons their Lordships will humbly advise His Majesty that the judgments of the High Court in these appeals be reversed and the judgment of the Subordinate Judge restored. The appellant's costs in the High Court will be borne by the respondents, and the costs of the appeal to His Majesty in Council as to two-thirds by defendant No. 2 and as to one-third by the defendant No. 2, who appeared to support the judgment of the High Court in the principal appeal.