

(1926) 06 AHC CK 0004
In the Allahabad High Court

Mahadeo Pandey and Others

APPELLANT

Vs

Sobha Nath Pandey and Another

RESPONDENT

Date of Decision : 25-06-1926

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 34 Rule 2

Citation : (1926) ILR (All) 828 : 97 Ind. Cas. 277

Hon'ble Judges : Walsh, J; Pullan, J

Bench : Division Bench

Judgement

1. 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 judgment. 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 6 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 realise that unless he exercise his right of redemption within 6 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. Juge Lobo 27 M. 40 and the case of Tara Pado Ghose v. Kamini Dassi 29 C. 644 cited by Mr. Durga Prasad, are merely examples making it quite clear that in the case of an ordinary mortgagor sui juris no formal notice is necessary. We find nothing in the case of Bibi Tasliman v. Harihar Mahto 32 C. 253 : 9 C.W.N. 81 inconsistent with this view.

2. Mr. Upadhia 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 every body is deprived of anything with which he pays his just debts, and if a parson owe 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, 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 Rambrich Ram v. Tarak Tewari 33 Ind. Cas. 805 : 14 A.L.J. 589 "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.

3. The appeal must, therefore, be allowed and the decree of the first Court restored with costs here and below, including in this Court fees on the higher scale.