
(1926) 06 AHC CK 0017
In the Allahabad High Court

Mahadeo Pandey and Others

APPELLANT

Vs

Somnath Pandey and Another

RESPONDENT

Date of Decision : 25-06-1926

Acts Referred:

Citation : (1926) 06 AHC CK 0017

Hon'ble Judges : Sulaimam, J

Bench : Single Bench

Judgement

Sulaimam, J.—This is a defendants' appeal arising out of a suit for redemption. A mortgage by conditional sale dated 47th June 1888, was executed by Ramsaran, the grandfather of Somnath and the great-grandfather of Ranjit. In 1909 after the new Civil P.C. had come into force, the mortgagees brought a suit for foreclosure and impleaded all the members of the family including the present plaintiff Somnath. Ranjit, plaintiff, was not even born then. The plaintiffs proposed to make Gaya, the father of Somnath, his guardian. It is not quite clear how the interest of Gaya was in any way adverse to Somnath, but Gaya apparently declined to act as guardian, with the result that the Court appointed the Nazir of the Court as the guardian of Somnath minor. The other members of the family compromised the claim, but an ex-parte decree was passed against Somnath under the guardianship of the Nazir on the 25th of September 1909. It is not suggested that there was any irregularity up to this stage in the proceedings.

2. In 1910 the mortgagees made an application for the preparation of a final decree for foreclosure, but instead of impleading Somnath under the guardianship of the Nazir they impleaded him under the guardianship of his own father Gaya. Notice was issued to Gaya for himself and as guardian of his own son Somnath but; he did not object. A final decree for foreclosure was then prepared. But in this final decree Somnath's name was mentioned without the addition of any words like "under the guardianship of the Nazir or Gaya." Subsequently the mortgagees applied for formal delivery of possession and again

impleaded Somnath under the guardianship of his father Gaya.

3. Now Somnath and his nephew Ranjit have brought this suit for redemption on the allegation that their rights have never been foreclosed. The Court of first instance dismissed the suit but on appeal the learned District Judge has decreed it. In my opinion this case raises substantial questions of law which require determination by a Division Bench. There is authority for the proposition that in preparing a final decree it is not absolutely necessary to issue fresh notice to the judgment-debtor. When the time fixed for the preliminary decree for payment has expired the mortgagors run the risk of a foreclosure decree being prepared, vide the case of Pandu Prabhu v. Juje Lobo (1904) 27 Mad 40 and the case of Tara Pado Ghose v. Kamini Dassi (1902) 29 Cal 644. There is, however, an observation in the case of Bibi Tasliman v. Harihar Mahto (1905) 32 Cal 253 that the Court itself has an inherent power to set aside an ex-parte decree which had been passed without notice to the mortgagor. All these cases were under the Transfer of Property Act. The learned District Judge in this case has conceded that it was not absolutely necessary to issue notice. What, however, he has held is that the Court decided to issue notice and did issue notice to Gaya and not to the Nazir. This, in the opinion of the learned Judge, amounted to an irregularity.

4. Another point mentioned is that in the final decree which was prepared, the name of Somnath alone was mentioned without the word "under the guardianship of the Nazir, "This has been taken to mean that ha was treated as a major and not a minor. This is said to be the second irregularity. The learned Judge has further held that inasmuch as Somnath has lost the right of redemption in consequence of the decree he has been prejudiced by the irregularities. The question whether the omissions mentioned above amount to irregularities is undoubtedly a substantial question of law.

5. As regards the question whether the minor has been prejudiced, it might ordinarily have been a question of fact, but the learned Judge has assumed that because the minor has lost his right of redemption, he has necessarily been prejudiced. Whereas one might have supposed that the injury should be a consequence of the irregularity. No attempt apparently was made to show that if notice had been issued to the Nazir himself the amount would have been paid in time and the property redeemed. On the other hand, it rather seems that the only persons who could have intervened or paid the money would have been Gaya, the father, to whom notice was actually sent. It may, therefore, be a question whether the plaintiffs have really been prejudiced by the absence of the notice issued to the Nazir. In two cases it has been held that in spite of the irregularity the minor defendant was not prejudiced, vide the case of Lachmi Narain Prasad and Others Vs. Kishan Kishore Chand and Others, which has been followed in the case of Kuber Upadhia Vs. Ramakar Dat Upadhia and Others, .

6. I accordingly refer the case to a Bench of two Judges.

7. 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 34 provide the machinery for enforcing mortgages by means of a foreclosure decree, and everyone agree 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 realize 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* (1904) 27 Mad 40 and the case of *Tara Pado Ghose v. Kamini Dassi* (1902) 29 Cal 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* (1905) 32 Cal 253 inconsistent with this view.

8. 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 person owes 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 connexion 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 Lachmi Narain Prasad and Others Vs. Kishan Kishore Chand and Others,

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,

9. 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.

10. 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.