

(1898) 06 CAL CK 0001

In the Calcutta High Court

Case No : Appear from Order No. 8 of 1898

Maharaj Kumar Guneshwar Singh

APPELLANT

Vs

Jagadhatri Persad Narain Singh and Others

RESPONDENT

Date of Decision : 06-06-1898

Acts Referred:

Citation : (1898) 06 CAL CK 0001

Final Decision : Dismissed

Judgement

Rampini, J.—This is an appeal against the order of the District Judge of Tirhoot, dated the 26th November 1897. The order is one setting aside a sale, held on the 16th January 1889, in execution of a decree, dated the 10th June 1884.

2. A preliminary objection is urged that no second appeal lies in this case. But it appears that the application was made under both secs. 311 and 244 of the Civil Procedure Code. If the case be regarded as one exclusively under the former section, no second appeal lies; under the latter an appeal lies. It seems impossible to hold that the case is one only under sec. 311, and I therefore think a second appeal will lie.

3. A suit to set aside the sale in question was brought on the 7th January 1890. This, was ultimately dismissed by this Court on the ground that application should have been made "under sec. 244. The present application under secs. 311 and 244 was accordingly made on the 16th April 1895. The Court of first (sic) disallowed it, but the District Judge allowed it on the 26th November last, holding (1) that the execution proceedings which led to the sale were tainted with fraud (2) that there Were material irregularities committed, in connection with the sale, " and (3) that substantial loss thereby resulted" to the applicant.

4. An appeal is now preferred against the Judge's order on the following grounds: (1) That the application is barred by limitation as made more than 6 years after the date of the sale; and (2) that the District Judge is wrong in finding that the execution proceedings were tainted" with fraud and irregular.

5. In answer to the first of these contentions it is urged on behalf of the Respondent that the applicant (now deceased) was a minor and that therefore his application is not barred by limitation. I am of opinion that this answer is sufficient (see Trevelyan on Minority, 2nd Edition, p. 304). The Advocate-General on behalf of the Appellant argues that if an application is made on behalf of a minor during the period of his minority it must be made within the same period as if he were adult, and that a minor is only entitled to take advantage of the provisions of sec. 7 of the Limitation Act when he makes the application himself after he has attained his majority. But the cases cited by Mr. Justice Trevelyan in the note at p. 304 of his book negative this contention. Dr. Rash Behari Ghose on the same side urges that the provisions of sec. 7 of the Limitation Act cannot, he given effect to in respect of applications in pending suits as it would be unreasonable to allow such suits to be reopened after the lapse of years. I can only say, however, that there appears to be no authority for this proposition.

6. The next plea put forward for the Appellant is, that the Judge was wrong in finding that the proceedings that led to the sale were "tamzed" with fraud. But I consider that the judges finding on this point" is a finding of fact which cannot be interfered with in second appeal. There was undoubtedly evidence on which the Judge was justified in coming to such a finding. The judgment creditor according to the Judge knew very well that the judgment-debtor was a minor and yet carried on the execution against him in the Munsif's Court, as if he were a major and without having been properly represented. He purposely dropped the proceedings against the judgment debtor in the Sub-Judge's Court when he found he would there have to bring the minor's guardian upon the record and proceeded with the execution in the Munsif's Court where he knew the minor was not represented.

7. That being so, the Judge's findings on the facts cannot be interfered with by the Court and I would dismiss this appeal with costs--five gold mohurs.

Henderson, J.

8. On the 10th June 1884, the Respondent in a contribution suit obtained a money-decree for Rs. 306 against one Jagadhatri Persad Narain, who was a minor, and others. The minor's share was Rs. 243. The first application for execution is dated the 10th June 1885 and in that as in all subsequent applications Jagadhatri was treated as of full age. A second application was made on the 20th July 1885 and under it 13 ans. in the village in dispute was attached. After various applications for execution the property attached was sold, and purchased by the decree-holder who was the sole bidder for Rs. 200. Of the 13 ans only 9 ans belonged to the minor. Of the 9 ans share 3 ans together with another property had been mortgaged for Rs. 25,000 and 7 taluks of the 9 ans were under a zuripeshgi lease to the Manjool Factory. Neither of these encumbrances was notified in the sale proclamation, which it was alleged had been published in the village on the 15th December 1888. Possession was obtained by the purchaser on the 25th March 1889.

9. On the 7th January 1891, a regular suite was instituted on behalf of the judgment debtor Jagadhatri to set aside the sale. That suit was dismissed in 1891 by the Subordinate Judge and the decree of the Subordinate Judge was confirmed by the High Court on the 19th August 1892.

10. On the 16th April 1895, an application under secs. 311 and 244 of the CPC was made by Jagadhatri who was still a minor, through his guardian, to set aside the sale. While the application was pending, Jagadhatri died without having attained his majority and his legal representatives have been substituted in his place.

11. The Munsif rejected the application, but on appeal the District Judge on the 26th November 1897 reversed his order and set aside the sale on the ground of material irregularity and fraud and consequent substantial injury. He found that it had not been proved that the sale proclamation had been published in the village; that no mention had been made of the encumbrances in (sic) (sic) tion; that the decree holder being aware that Jagadhatri was a minor, had deliberately and with fraudulent intent omitted to have the minor represented in the proceedings which resulted in the sale; that the value of the property which had been sold for only Rs. 200 was upwards of a lakh of rupees; and that the inadequacy of the price paid was due to the fraud and irregularity.

12. It has been contended on behalf of the Appellant (1) that there was no evidence that the decree-holder deliberately and of purpose omitted to have the minor represented in the execution proceedings; (2) that the decree-holder has not been shown to have been responsible for the irregularity in, and in the publishing of, the sale proclamation; (3) that it has not been shown that the inadequacy of price was due to the irregularity; that there was in fact no fraud, and lastly that the application was barred, by limitation--a contention not raised before the lower Courts.

13. On objection being taken that no second appeal lies in this case it was admitted that so far as the application depends upon, or is made under sec. 311 of the CPC no second appeal lies to this Court.

14. With regard to the omission to have the minor represented in the execution proceedings the District Judge has in his judgment stated fully the evidence upon which he based the conclusion that the judgment-debtor had deliberately made the omission. It is not ordinarily open to us in second appeal to deal with findings of fact, but it seems to me that that evidence fully justifies the conclusion at which he arrived. He pointed out that (sic) the 14th August 1888 the maternal "grandfather of the minor in another execution case in another Court in which the Respondent here was also the decreeholder brought it to his notice, and to the notice of that Court, that the guardian of the minor had died, and that thereupon the Respondent had undertaken to have another guardian appointed before proceeding with the execution. No guardian however was appointed, and the execution in that case was not proceeded with. But while he dropped the

proceedings in that case, which was in the Court of the Subordinate Judge. he went on with the execution proceedings, before the Munsif in the present case as if the minor were of full age, and without informing the Court of the death of the minor's guardian who was the same in both cases.

15. I think it is impossible to ascribe this conduct to anything but a fraudulent motive. The natural effect would be to cause the persons interested in the minor to conclude that nothing would be done until the Respondent had, in terms of his undertaking given in the execution proceedings before the Subordinate Judge had a guardian appointed.

16. As to limitation a number of cases have been cited before us, namely, In the matter of petition of Sita Ram Kheso ILR 15 All. 17, Phoolbas Koonwar v. Lalla Jogeshur Sahoy I. L. R. 1 Cal. 242, Kailash Chandra Haldar V. Bissonath Pramanic I C. W. N. 67, Mon Mohun Buksee v. Gunga Soondery Dabee I. L. R. 9 Cal. 181, Lalit Mohun Misser v. Janoky Nath Roy ILR 20 Cal. 714, Moro Sadashiv v, Visaji Raghunath I. L. R. 16 Bom. 536, Fatimunnissa v. Deoki Pershad ILR 24 Cal. 352, Thurai Rajah v. Jainilabdeen Rowthan ILR 18 Mad. 484.

17. In my opinion the application is not barred. It is saved by sec. 7 of the Limitation Act (XV of 1877) which says "If a person entitled to * * * make an application be at the time from which the period of limitation is to be reckoned a minor * * * he may * * * make the application within the same period after she disability has, ceased as would otherwise have been allowed from the time prescribed therefor in the 3rd column of the second schedule hereto annexed."

18. At the time the application was made on his behalf by his guardian Jagadhatri was under the disability of minority and the operation of the Act was suspended during the continuance of the disability by sec, 7 of the Act. See Lalit Mohun Misser v. Janoky Nath Roy ILR 20 Cal 714. The application therefore was not barred, and it need not have been made until the minor came of age. It cannot, I think, be said that while there was no bar against the minor himself, the application which was made by his guardian must be taken as having been too late.

19. On behalf of the Appellant it was contended that sec. 7 of the Limitation Act does not apply to applications in pending suits, but I am not prepared to accede to this contention. I agree in dismissing this appeal with costs.