
(1933) 01 CAL CK 0029
In the Calcutta High Court

Midnapore Zamindary Co., Ltd.

APPELLANT

Vs

Abdul Zalil Mia

RESPONDENT

Date of Decision : 17-01-1933

Acts Referred:

Citation : AIR 1933 Cal 627

Hon'ble Judges : Mitter, J;M.C. Ghose, J

Bench : Full Bench

Judgement

Mitter, J.—This appeal is directed against two orders embodied in one judgment of the Subordinate Judge of Nadia which is dated 29th March 1932. The first order which is attacked is an order directing amendment of a rent decree and the second order challenged by this appeal is one refusing personal execution of the decree against the respondent as asked for by the decree-holders appellants.

2. The questions which fall for determination in this appeal depend on facts which are either admitted or have been proved in this case. They may be briefly stated: It appears that the Midnapur Zamindary Co. Ltd., now appellants, brought a rent suit in the year 1923 against four persons, namely, Abdul Jalil Mia, now respondent, Esmail Hossein Mia, a minor represented by his guardian ad litem Ainuddin and two other persons who were the darpatnidars under them. The rent suit was for arrears for the period 1327 to Pous kist of 1329 B.S. The defence to the suit was that the plaintiffs, the Zamindary Co. Ltd., had dispossessed the defendants from a portion of the darpatni and there should be entire suspension of rent. This defence was given effect to by the Subordinate Judge who tried the suit in the first instance and plaintiff's suit was dismissed. This decree of dismissal was affirmed by the District Judge on appeal. There was a further appeal to the High Court by the plaintiff company and during the pendency of the second appeal Ainuddin, the guardian of Ismail, died but no new guardian was appointed in his place. On 10th February 1928 the High Court decreed the appeal and sent back the case for determination of the extent of dispossession by the plaintiffs and for passing a decree in plaintiffs' favour after

allowing proportionate abatement of rent to the defendants on account of the dispossessed area. On remand Esmail was not represented by a guardian and a decree was passed in favour of the plaintiffs for Rs. 4,092 odd not only against the three defendants who were properly represented but also against Esmail Mia, who was not represented by a guardian ad litem. In execution of this decree the sale of the darpatni took place on 9th July 1931 and it was purchased by the plaintiffs company for Rs. 35,000. As the claim for rent was for Rs. 5,000 there was a surplus of Rs. 30,000 in favour of the judgment-debtors, the four defendants in the suit.

3. During the pendency of this suit before the Subordinate Judge after remand by the High Court, two other suits for rent of the same darpatni for a subsequent period had been instituted by the plaintiffs' company. They were Rent Suits Nos. 7 of 1926 and 11 of 1930. These suits were jointly tried and were decreed on 31st March 1931. From the surplus sale proceeds of the sale in execution of the rent decree in Suit No. 3 of 1923 the entire claim of the Rent Suit No. 11 was satisfied and a substantial portion of the decree in Rent Suit No. 7 of 1926 was satisfied. The plaintiffs company have executed the decree for the balance in Rent Suit No. 7 of 1926 and have attached the personal properties of the respondent Abdul Jalil Mia who is one of the judgment-debtors in the suit. In order to understand the objection of the judgment-debtor Abdul Jalil Mia one fact has to be borne in mind and that is this: in the judgment of Rent Suit No. 7 it was directed that the tenure should be sold first in execution of the decree in accordance with a stipulation in the darpatni patta (Ex. 2) to that effect, but this clause was, omitted from the decree and an application was made for the amendment of the decree by bringing it into conformity with the Judgment, and the amendment of the decree has been made. The order allowing amendment, as has been already stated, has been attacked in this appeal and we will return to this hereafter. The main objection of the respondent judgment-debtor to this personal execution is that as according to the decree as amended the tenure must be sold in the first instance, and as the sale of three annas share of Esmail Mia is absolutely void as the sale was in pursuance of a decree in a suit in which he was not properly represented, three annas share of the tenure still remains unsold, and according to the decree no personal execution can issue against one judgment-debtor till the darpatni tenure in its entirety is sold. This objection, has prevailed with the learned Subordinate Judge below and he has allowed the objection and has directed that the tenure should be sold first and if any balance be left, then it could be executed personally against the judgment-debtor.

4. The Midnapur Zamindary Co. has accordingly preferred this appeal and the learned Counsel raises two contentions before us: (1) that the decree in Suit No. 7 of 1926 should not have been allowed to be amended at the late stage after it has been partly satisfied and that execution Court has no jurisdiction to amend the decree. (2) The second contention may be subdivided under three heads: (A) that the sale of Esmail's share is not a nullity and (B) even if the sale be regarded as void, the fact that Esmail was represented in the proceedings in

execution and his guardian took part in the proceedings relating to the settlement of value of the property to be advertised for sale estops him from challenging the validity of the sale and (C) even if that is not so, the fact that Esmail after attaining majority allowed the surplus sale proceeds of the sale which is impeached as void to be applied to the satisfaction of the decree in Kent Suit No. 11 and partly of Suit No. 7 of 1926 estopped him from challenging the sale. The first contention of the appellant has really no substance, for it is now well settled that a decree could be brought into conformity with the judgment even after the lapse of years and that the only limitation is that the Court may deem it inexpedient or inequitable to exercise its powers where third parties have acquired rights under the erroneous decree without a knowledge of the circumstances which would tend to show that the decree was erroneous: see *Hatton v. Harris* (1895) AC 547. In the present case no rights of third parties had intervened at the date of the amendment of the decree. We are consequently of opinion that amendment has been rightly allowed. There is no substance also in the contention that the Court could not amend the decree in the course of execution. It appears that the executing Court and the Court which passed the decree are one and the same and it was at the instance of the appellant that orders on the petition for amendment were not passed till after the merits of the objection were heard.

5. Taking now the first branch of the appellants' second contention that the sale of Ismail's share is not a nullity it appears to me that this contention cannot be sustained, for, it is now well established on the highest authority that the Court has no jurisdiction to sell the property of persons who were not parties to the proceedings or properly represented on the record. As against such persons the decrees and sales purporting to be made would be a nullity and might be disregarded without any proceeding to set them aside. If authority be desired for these elementary propositions, it may be found in the judgment of Sir Barnes Peacock in *Kishen Ghose v. Asman Marshall* 647: see the observations of Lord Davey in *Khiraajmal v. Dain* (1905) 32 Cal 296. In the present case Ismail was not represented in Rent Suit No. 7. after remand. Consequently the sale of his share is void and of no effect in law. The second branch of the second contention is that even if the sale be regarded as void as Ismail was represented in the execution proceeding which led to the sale by his uncle Jahiruddin (see Ex. B) it must be taken that the sale of Ismail's share was ratified. This contention does not seem to me to be right, for Ismail was a minor at the date of the execution proceedings and no act done by his guardian during his minority can render a void sale valid.

6. The third branch of the second contention, namely, that here was ratification of the sale by Ismail after he had attained majority seeing that after attaining age he allowed the surplus sale proceeds to be taken in execution of the decree for rent for the subsequent period seems to me to be well founded and must prevail. It has not been disputed before us that Ismail had attained the age of majority when the rent decree in Suit No. 11 of 1930 was executed and the said

proceeds were applied to his use or for his benefit as it extinguished his liability for rent for the period covered by Suit No. 11 of 1930 and this circumstance must be regarded as ratification by him of the sale in execution of the rent decree in the suit of 1923. In allowing the surplus sale proceeds to be taken for satisfying his liability in the rent decree No. 11 he has ratified the sale by a course of conduct which stops him from denying the validity of the sale and indeed it is a significant circumstance that Ismail has never applied to set aside the sale. The law with regard to ratification of void sale by the acts of the parties in interest has been well put by Mr. Freeman in his Law of Void Judicial Sales (Section 50, p. 170) and may be usefully reproduced here:

As a general rule a confirmation or ratification cannot strengthen a void estate. "For confirmation may make a voidable or defeasible estate good, but cannot operate on an estate void in law." If this rule be one of universal application, then there can be no necessity for considering the question of ratification in connexion with void judicial sales. But this is one of those rules which are so limited by exceptions, that the circumstances to which it may be applied are scarcely more numerous than those from which its application must be withheld. There can now be scarcely any doubt that void judicial sales are within the exceptions, and are unaffected by the rule. These sales may be ratified either directly or by a course of conduct which estops the party from denying their validity. Thus if the defendant in execution after a void sale of his property has been made, claims and receives the surplus proceeds of the sale with a full knowledge of his rights, his act must thereafter be treated as an irrecoverable confirmation of the sale.

7. Ismail having ratified the sale it is not open to him again to challenge the validity thereof and far less is it open to the present respondent to impeach the sale. There can be no question that as against him the sale of Ismail's share must be regarded as valid. The result is that the Subordinate Judge's order regarding the amendment of decree must stand and that his order directing that the tenure should be sold first must be set aside. The plaintiffs decree-holders will be entitled to proceed against the respondent judgment-debtor for the realization of the balance due under the decree in Suit No. 7 of 1926. This appeal, in so far as it is directed against the order giving effect to the objection of the respondent Abdul Zalil Mia to personal execution, is allowed with costs here and in the Court below. We assess the hearing fee in this Court at two gold mohurs. In view of our judgment in the appeal no order is necessary in the Rule (Civil Rule No. 707-M of 1932.)

M.C. Ghose, J.

8. I agree.