

(1916) 03 AHC CK 0007
In the Allahabad High Court

Rambrichh Ram and Others

APPELLANT

Vs

Tarak Tewari through Pahlad Tewari

RESPONDENT

Date of Decision : 07-03-1916

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 23

Citation : AIR 1916 All 353 : 33 Ind. Cas. 805 : 33 Ind. Cas. 801

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

Bench : Division Bench

Judgement

Piggott, J.—This is a suit which arises out of a previous suit for redemption. The plaintiff-respondent was one of the defendants in the said suit for redemption. He was at the time a minor. The plaintiffs in that suit described all the defendants as members of a joint undivided Hindu family and asked that one of them, by name Kanhai, might be appointed guardian ad litem for all the minor members of the family impleaded as defendants. Kanhai accepted this position with regard to some of the defendants, but he refused to act as guardian ad litem for the present plaintiff. The Court thereupon appointed the central nazir guardian ad litem for this minor. In doing so it contravened the provisions of the law by not issuing a notice to the minor or to the aforesaid Kanhai, or to any other person of its intention to appoint the central nazir as guardian. That official did not as a matter of fact defend the suit. It was, however, defended by Kanhai, who contested the suit throughout and only lost it on appeal to this Court. The result, however, was a decree for redemption in favour of the plaintiffs-mortgagors. The present suit has been brought against the mortgagers, the successful plaintiffs in the former suit, against Kanhai and other mortgagee defendants, who for some reason, not to me very apparent, are divided into two categories described as defendants 2nd party and defendants 3rd party, and finally against the central nazir, the former guardian ad litem of the present plaintiff in the redemption suit. As originally drafted the relief sought was a mere declaration, and one of the pleas taken in reply was that the plaintiff was bound to sue for possession. This plea so far prevailed that the plaint was amended to

meet the objection. On the plaint as amended, therefore, the plaintiff is seeking to recover mortgagee possession of the property which was the subject-matter of the former redemption suit. I am not sure that either of the Courts below has fully appreciated on its legal aspect the nature of the defence set up by the mortgagors. Their essential defence was that the plaintiff could not recover mortgagee possession because the mortgage had been redeemed. Incidentally, and in further support of this essential plea, they also pleaded that the plaintiff in the present case could not deny the fact that the mortgage had been redeemed, because redemption had been effected by means of a suit in which the present plaintiff was himself a defendant. On the pleadings as they stood before him the learned Subordinate Judge framed five issues. He has decided four of them, and the one issue which he has left undecided is issue No. 4, which was framed in the following terms: "Does the former decision operate as *res judicata*." In the result he dismissed the plaintiff's suit. He did so after deciding one issue of fact which in my view was of the greatest possible consequence. He found upon the evidence that the plaintiff and the defendants 2nd and 3rd party were in fact members of a joint undivided Hindu family, both at the time of the former suit and since, and he further found that Kanhai already mentioned was the karta or manager of this joint family. If the learned Subordinate Judge had said that this was an issue of fact which he declined to try, because in his opinion it was unnecessary to look at anything except the result of the redemption suit and the fact that the plaintiff was formally represented therein by a guardian appointed by the Court, I might have felt grave doubt as to the correctness of his decision. He was, however, fully aware of the fact that there had been a grave irregularity in the proceedings of the Court which tried the redemption suit. He went on to consider, however, whether that irregularity had in any way prejudiced the interest of the present plaintiff. In order to determine this question, it was undoubtedly of the greatest importance to try the issue as to the jointness or separation of the family.

2. If the present plaintiff had been, as he alleged, living separately from the joint family of which Kanhai was the head, he might have had a defence to the suit not open to Kanhai, and there would have been room for doubt whether the mortgage had been effectively redeemed by payment made to Kanhai as the result of the former litigation. Having tried out this question of fact, and determined it against the plaintiff, the learned Subordinate Judge naturally held that the plaintiff had been in no way prejudiced by the result of the previous litigation. He advisedly left undecided the 4th issue to which I have already referred, thereby it seems in effect holding that, it was immaterial to determine whether the former decision could or could not be said to have the effect of *res judicata* in respect of the present litigation, because in any case the present suit must fail once the Court has found that there has been a redemption of the mortgage, in consequence of a litigation effectively fought out by the mortgagors on the one side and by the head and manager of the joint Hindu family, to which the present plaintiff belongs, on the other. The suit having been dismissed by the

first Court, the plaintiff went on appeal to the Court of the District Judge to what the learned District Judge intended to decide I must confess myself a little doubtful. He says in one place that the first Court's finding, to the effect that the present plaintiff was not prejudiced by the irregularity committed in the former suit, was "premature", whatever that may mean. In another place he says that the plaintiff must be deemed to have been prejudiced. He finishes up, however, by passing what purports to be an order under the provisions of Order XLI. Rule 23 of the Code of Civil Procedure, remanding the suit for "decision on the merits." Now the first Court has not decided the suit on a preliminary point nor has the learned District judge in clear terms reversed the decision of the first Court on any point whatsoever. On this ground alone, therefore, this order of remand is liable to be set aside. In the course of an able and ingenious argument addressed to us on behalf of the respondent it has been contended that the proper order for the learned District Judge to have passed would have been an order decreeing the plaintiff's claim, and that such an order should now be substituted by us for the order of remand. I am content to put on one side the question whether we could legally do what the respondent has asked us to do. In the face of the finding recorded by the Subordinate Judge, which has apparently been endorsed by the lower Appellate Court, as to the jointness of the plaintiff with the defendants. 2nd and 3rd party, it is obvious that the plaintiff's suit cannot be decreed. I think there was somewhere at the back of the learned Judge's mind a feeling that there were some other questions of fact which he would like to see determined before coming to a final decision on the suit. If the learned District Judge had been content to observe strictly the provisions of the law, he would have stopped to ask himself what questions, if any, there were as to which he required further findings and to put them in the form of issues. In the attempt to do so he would probably have cleared his own mind as to the rights and wrongs of the case, and might have saved himself from arriving at an erroneous conclusion. I am unable to see that there were any other questions of fact requiring determination, once the first Court arrived at the finding already referred to. There has been an effective redemption of this mortgage by means of the suit in which the karta of a joint Hindu family was a defendant, and which was stoutly resisted by the aforesaid karta and fought by him up to the ultimate Court of Appeal. In a suit of this nature, thus contested, the interests of the minor members of the joint family are effectively and properly represented by the karta of the family, whatever irregularity there may have been in the proceedings of the Court. Moreover, a redemption thus effected is binding upon all the members of the family. I hold, therefore, that the learned Subordinate Judge was right in dismissing the plaintiff's suit. This appeal must prevail, the order of remand passed by the learned District Judge be set aside and the decree of the first Court dismissing the plaintiff's suit be restored, with costs throughout, including in this Court fees on the higher scale.

Walsh, J.

3. I entirely agree. 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 to my mind the minor's right to set aside the proceedings must be denied. In this case there are two clear findings of fact: (1) that there was no collusion or fraud and (2) that the minor's interests were not prejudiced. Dr. Sen was unable to show that these findings of fact were not founded upon legal evidence or not justified. In my opinion they are fatal to his suit and the suit was rightly dismissed by the first Court. I should not have thought it necessary to add anything, had it not been for the fact that the learned District Judge clearly misapplied--in a way which I am afraid is too common--two decisions of this Court. In his painstaking judgment, in which he has given in chronological order the facts as established in the Court below he arrived at a point where it was necessary to come to a legal decision. He unfortunately went entirely wrong. It may often be the fault of the Advocate, sometimes it is the fault of a Judge, who quotes an extract from a case which the Judge has no opportunity to examine closely. In this particular instance the District Judge has said that he followed the view expressed by the learned Chief Justice in the case which has been referred to, that the plaintiff must be deemed to have been prejudiced. The Chief Justice said nothing of the kind. The Privy Council has held that it is a matter of evidence. He has further said, quoting from the Chief Justice, that the appointment of the nazir as guardian without providing funds to enable him to defend the suit is generally a little more than a farce. He went on to apply that dictum omitting the qualifying word "generally" and held that it was invariably a farce, and therefore, invalid. In the second place he misapplied an authority which was quoted to him from the reporters diary in Allahabad Law Journal, Vol. XII, a decision by my brothers Tudball and Piggott. He held that that case decided that if the appointment was irregular the minor must be deemed to have been prejudiced in the suit. So far from that being the case, the decision to which he referred held on the facts of the particular case the appointment was irregular and the minors were prejudiced in their defence. To my mind there are two distinct issues. Both have to be established by evidence. They are not one issue and in treating them as one issue the District Judge, I think, was misled by the two cases to which he was referring. In this particular instance the plaintiff has failed to establish the second issue and consequently the suit fails.

4. The appeal is allowed, the order of remand passed by the lower Appellate Court is set aside and the decree of the first Court dismissing the plaintiff's suit is restored with costs throughout, including in this Court fees on the higher scale.