

Dwarika Halwai Vs Sitla Prasad and Others

Court: Allahabad High Court

Date of Decision: Jan. 18, 1940

Citation: AIR 1940 All 256 : (1940) 10 AWR 253

Hon'ble Judges: Bennet, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Bennet, J.

This is an appeal by Dwarka Halwai, defendant, originally an auction-purchaser, against a decree in favour of the plaintiff. The

present decree of the trial Court is that the decree in O.S. No. 188 of 1924 dated 24th September 1924 of the Court of the Munsif, Syed Ali

Akbar v. Sitla Prasad and others, is null and void and is not binding on the plaintiff and the plaintiff shall receive possession over the house in

dispute. Syed Ali Akbar brought a suit, No. 16 of 1922, and obtained a decree on a promissory note against Maksudan Das. Syed Ali Akbar

attached a house in Shahganj, district Jaunpur, in execution of this decree. Mt. Ram Pati, the wife of Maksudan Das, judgment-debtor, objected

under Order 21, Rule 58, Civil P.C., that her mother Mt. Shiam Kunwar had built this house and that the house belonged to her on the death of

her mother and that Maksudan Das had no interest in the house. Mt. Ram Pati then died and the present plaintiff Sitla Prasad, a minor, was

substituted as the son adopted by Maksudan Das, her husband, and as the person who was entitled to succeed to the property of Mt. Ram Pati.

The execution Court decided the objection in favour of Sitla Prasad.

2. Syed Ali Akbar then filed a suit, No. 188 of 1924, against Sitla Prasad minor for a decision that the house in question was the house of

Maksudan Das. Syed Ali Akbar named Hanuman Prasad, the father of Maksudan Das, as the guardian ad litem of Sitla Prasad, but no notice was

served on him and then Syed Ali Akbar applied to the Court for the appointment of B. Ganga Saran Vakil and the Court appointed B. Ganga

Saran as the guardian ad litem of the minor defendant Sitla Prasad. We are also told that Syed Ali Akbar made a payment to B. Ganga Saran

Vakil of the amount required for the defence of the minor. But no appearance was entered in the case by B. Ganga Saran Vakil on behalf of the

minor and he did not contest the suit at all. Accordingly, the suit was decreed ex parte against the minor on 24th September 1934. Syed Ali Akbar

then applied for attachment in execution of his decree in O.S. No. 16 of 1922. There was attachment and sale on 2nd March 1926 and the

present appellant Dwarka Prasad purchased this house. Delivery of possession was granted to him on 3rd May 1926. Some argument has been

made to us that the plaintiff was entered as the legal representative of Maksudan Das in these execution proceedings and that in his present

capacity as plaintiff in this suit those execution proceedings would be binding on him. One answer to this argument is that in the execution

proceedings he was appointed to represent his father Muksudan Das and as legal representative of his father he did not represent himself in his

personal capacity nor was he the legal representative of his deceased mother Mt. Ram Pati. In the present case the plaintiff claims this house as the

property which he inherited from his mother. It is clear that his being entered in the execution proceedings as legal representative of his father can

have no bearing on his right to claim property inherited by him from his mother. The Court below notes in regard to the argument of Maksudan

Das being represented by Sitla Prasad:

This point does not appear to have been pressed in the lower Court and there is nothing to show that Sitla Prasad was duly represented by a

proper guardian in the execution proceedings

and therefore the Court held that Section 11, Civil P.C., would not bar the present suit.

3. Various issues were raised before the Courts below and agreeing with the trial Court the lower Appellate Court has held: (1) the house

belonged to Mt. Shiama Kunwar and after her death to Mt. Ram Pati and not to Muksudan Das; (2) the plaintiff is the adopted son of Maksudan

Das and the heir to his wife Mt. Shiama Kunwar; (3) there was gross negligence of B. Ganga Saran Vakil guardian ad litem of the plaintiff; (4) the

plaintiff was less than 21 years of age when the present suit was brought and therefore the suit is within limitation; (5) Section 41, T.P. Act, does

not apply to auction sales as held in *Puran Mal and Another Vs. Shiva Lal and Another*, . Section 11 and Section 47, Civil P.C., do not apply.

4. The point which has been argued before us is that the appellant is an auction-purchaser but was not the decree-holder in O.S. No. 16 of 1922

and that the decree in that suit was merely voidable and not void ab initio and therefore it was a valid decree at the time of sale, and the mere fact

that the plaintiff has now got that decree avoided is no reason why the sale should be set aside. No ruling has been shown precisely on the point

alleged by the appellant. The appellant relies on *Zain-ul-Abdin Khan v. Muhammad Asghar Ali Khan* (1888) 10 All 166. In that suit a judgment-

debtor sued to set aside sales of his property in execution of the decree against him in force at the time of the sales, but afterwards so modified, as

the result of an appeal to Her Majesty in Council, that as it finally stood, it would have been satisfied without the sales in question having taken

place. It will be noted that in this case the decree was upheld by the Privy Council in appeal and the claim of the judgment-debtor was that the

decree was so modified that a less amount of property sold would have been sufficient. It was under these circumstances that the Privy Council

decided that the sale should be set aside so far as the purchases were made by decree-holders but the sales should not be set aside so far as they

were made by persons who were not decree-holders. It is clear that this was a peculiar case and it was not a case of a sale on a decree where the

decree was reversed by a superior Court after the sale. This distinction has been pointed out in *Doyal Sarkar Vs. Tari Deshi and Others*, . The

Privy Council case was not one in which the argument could have been made that the sale was invalid because the decree under which it was held

was subsequently set aside. The argument for the judgment-debtor was merely that under the ultimate decree a less amount of property might have

been sold or should have been sold. It would appear that the rights of a judgment-debtor under such circumstances are sufficiently compensated

by the payment to him of the surplus of the auction sale proceeds. The sale was set aside only as regards the decree-holders because they were

parties to the suit. But the ruling does not appear to have any direct bearing on the case before us. Reference was also made by learned Counsel

for the appellant to a Full Bench ruling, *Mt. Siraj Fatima and Others Vs. Mahmood Ali and Others* . That was a Full Bench ruling where there was

no issue referred to the Full Bench but the whole case was referred to the Full Bench. It was a somewhat peculiar case where defendants applied

in the Revenue Court for partition of their shares. The plaintiffs were minors and were represented by their certified guardian and not by a guardian

ad litem. The guardian objected that the defendants had no right in the property. A question of proprietary right was raised in the Revenue Court

and the Revenue Court directed the guardian to file a civil suit within three months. The guardian failed to file the civil suit and as a result the

Revenue Court decided the question against the plaintiffs and ordered partition. One of the plaintiffs on attaining majority instituted the civil suit for

declaration of title to the property. It was held that the legal rights of the plaintiffs being absolutely clear the failure of the guardian to file a civil suit

as ordered by the Revenue Court prejudiced the interests of the minors and the guardian ceased to represent the minors properly and effectively

and the minors were entitled to treat the partition order as not binding on them. On p. 447 the ruling laid down:

It therefore follows that the real basis of the binding character of a decree against a minor is the fact of his having been duly represented by a

proper person, and not the mere existence of any formal order appointing a guardian for him. Even when there be such an order, if the guardian

does not properly represent him, the decree would not be binding. On the other hand, even if there be any defect in the formal appointment of a

guardian, the decree would be binding upon him if he is sufficiently represented and his interests are well protected.

5. This passage shows that the Court was of opinion that even where there was an order appointing a person as guardian if that guardian did not

properly represent the minor the decree would not be binding on the minor. We understand that the Full Bench meant that such a decree would be

void ab initio and not merely voidable. The Court below therefore was correct in holding that this decree in O.S. 16 of 1922 would be void ab

initio and that being so the sale would be an invalid sale. There is no principle of law which applies to an auction sale, the principle of Section 41,

T.P. Act, and in the case of an auction sale held under a decree which is void the sale cannot pass the right, title and interest of the judgment-

debtor. In *Rashid-un-nisa v. Muhammad Ismail Khan* (1909) 31 All 572 it was laid down by their Lordships on p. 582:

Section 244, Civil P.C., applies to question arising between parties to the suit in which the decree was passed, that is to say between parties who

have been properly made parties in accordance with the provisions of the Code. Their Lordships agree with the Subordinate Judge that the

appellant was never a party to any of the suits in the proper sense of the term. Her sister, *Ulfat-un-nisa*, was a married woman, and therefore was

disqualified u/s 457 of the Code from being appointed guardian for the suit, and *Mouladad*'s interest was obviously adverse to that of the minor.

6. The Court therefore held that the minor had not been properly represented in the litigation and that a suit by her to set aside decrees and sale

which had taken place in execution of the decrees was not barred by Section 244, Civil P.C. In *Hanuman Prasad v. Muhammad Ishaq* (1906) 28

All 137 it was held that the provisions of Section 443, Civil P.C., as to the appointment of a guardian ad litem for a minor defendant are imperative

and where those provisions are not substantially complied with the minor is not properly represented and any decree which may be passed against

him is a nullity. Learned counsel for the appellant relied on *Mukhoda Dassi v. Gopal Chunder Dutta* (1899) 26 Cal 734. It was held in the ruling

that a mortgagor is not entitled to redeem the property which was purchased by a third party at a sale held in execution of an ex parte mortgage

decree and confirmed whilst the ex parte decree was still in force though the said decree was set aside and subsequently re-affirmed after trial. It

would be difficult to see on what principle the contrary could have been held and the ruling has no bearing whatever on the present case. We

consider that the decrees of the Courts below were correct and we dismiss this second appeal with costs.