

Brojo Nath Pal Vs Juggeswar, Bagchi and Others

None

Court: Calcutta High Court

Date of Decision: Jan. 20, 1909

Judgement

1. This is an appeal on behalf of the first defendant in an action for recovery of possession of Immovable property. The plaintiffs-respondents

founded their claim on two execution sales which took place on the 22nd July 1892, and were confirmed on the 28th October following. The

property in dispute, a tank with its banks, belonged admittedly to a person named Hari Mohan, and the sales on which the title of the plaintiffs is

founded, took place in execution of a decree against some of his heirs. The defendant resisted the claim principally on the ground that the sales, as

well as the decree on which they were based, were vitiated by fraud. They also questioned the extent of the interest which the plaintiffs had

acquired by their purchase. At the same time, they instituted under Sections 244 and 311 of the CPC of 1882 separate proceeding to set aside the

execution sales on the ground of fraud and material irregularity. There proceedings have now been terminated by a judgment of this court, and it

has been finally decided between the parties that the execution sales, which were the root of the title of the plaintiffs, cannot be impeached on the

grounds set forth In the suit itself, the learned Subordinate Judge, differing herein from the Munsiff has found that neither the sale nor the decree on

which it was based, is open to attack on the ground of fraud. In this view of the matter he has decreed the claim in full. The first defendant has now

appealed to this court, and on his behalf the decision of the Subordinate Judge has been challenged substantially on four grounds, namely, first that

the court of appeal below ought not to have given a decree on the footing of the execution sales when their validity was in question in the

proceedings instituted to set them aside; secondly, that as the plaintiffs had purchased the right, title and interest of a Hindu widow in the estate of

her husband, the appellant who represented the interest of the reversioner was in no way affected thereby; thirdly, that as the execution sales on

which the title of the plaintiffs is founded, had taken place during the pendency of proceedings to enforce a mortgage previously executed by the

judgment-debtor, the title of the plaintiffs cannot take precedence over that of the purchaser at the mortgage sale from whom the appellant has

derived his title; and fourthly, that inasmuch as the plaintiffs as well as their predecessor in title had allowed the judgment-debtor to continue in

possession in spite of the execution sales, they could not recover the property from the appellant who was a bona fide purchaser for value without

notice of the title of the respondents.

2. As regard the first contention of the appellant, it is obvious that there is no substance in it. The proceedings to set aside the sales have now

terminated and the result of the final decision is that the validity of the sale cannot be questioned on the ground of fraud and material irregularity. It

is unnecessary, therefore, to consider what the position of the plaintiffs might have been if in the collateral proceedings the execution sales had been

set aside. There can be no question that at the present moment there are valid subsisting sales on which the plaintiffs are entitled to rely in support

of the title they set up. The first ground, therefore, completely fails.

3. In support of the second ground urged on behalf of the appellant, it is pointed out that the interest of Hari Mohan which extended over a five

annas share of the property, was taken equally by inheritance by his two sons, Modhu Shudan and Gopal Chandra. Upon the death of Modhu

Shudan his share was inherited by his widow, Nobin Kishori, who had at the time a daughter Radharani. The share of Gopal Chandra upon his

death passed to his three sons, Brojo Nath, Radhanath and Gopinath, of whom Radhanath subsequently transferred his share to Akhoy Kumar

The result of this devolution of the property was that Nobin Kishori, Brojonath, Gopinath and Akhoy Kumar became owners of the entire share,

originally owned by Hari Mohan. Subsequently in 1892 Kirti Bhusan, husband of the second plaintiff, purchased the entire share at the execution

sales upon which the plaintiffs rely. It appears that Brojonath Sarkar, Kirti Bhusan and several other persons had previously purchased at

execution sale, certain other properties which formed part of the estate of Modhu Shudan and his co-sharers, Gopinath and Akhoy Kumar. Nobin

Kishori along with, her co-sharers brought in 1890, a suit to set aside the auction sale in the court of the Munsiff of Howrah. Objection was

apparently taken on behalf of the defendant that the real value of the property in dispute placed the matter beyond the jurisdiction of the Court.

When the suit came on for final disposal, the Munsiff held that he had no jurisdiction and ordered the plaint to be returned to the plaintiff for

presentation to the proper Court. He further directed the plaintiff to pay the costs of the proceeding to the defendant. The plaint was subsequently

filed in the Court of the Subordinate Judge of Hooghly and Nobin Kishori as well as her co-sharers obtained a decree for recovery of the disputed

property. One of the defendants in that case, however, took out execution of the decree for costs made in his favour in the infructuous proceedings

before the Munsiff, and in the course of this execution proceeding the property now in dispute was sold and purchased by the decree-holder, Kirti

Bhusan, from whom the plaintiffs have derived title. The defendant appellant has derived title from the reversionary heir to the estate of Modhu

Shudan, that is, his daughter Radharani, as also from her co-sharers in the property, namely, Gopinath, Akhoy Kumar and Benoy Krishna, who

was the representative in interest of Brojonath. On behalf of the defendant appellant it is contended that the effect of the execution sale on the basis

of the decree for costs against Nobin Kishori was to pass her limited interest only which terminated upon her death. It is argued, on the other hand

that the decree was made against her in her character as representative of her husband's estate, and that the effect of the execution sale was to

vest the property in the purchaser so as to give him a title binding upon the reversionary heirs. In our opinion the view put forward on behalf of the

plaintiffs is well-founded and must prevail. There can be no question that the suit to set aside the sale and to recover possession of the property

was commenced by Nobin Kishori as the representative of the estate of her husband and for the benefit thereof. There can be no dispute also that

that claim was well founded on the merits, as the result of the trial before a court of competent jurisdiction subsequently manifested. The decree for

costs against her in the preliminary proceeding must be taken to have been made against her as representative of the estate, and when in execution,

the property was brought to sale it must be taken that not merely her limited interest but the entire inheritance passed to the auction purchaser. The

learned Vakil for the appellant argued that the decree for costs was purely personal and that the sale of her right, title, and interest in the execution

proceedings signified a transfer of her limited interest only. This contention is opposed to the principle of the decision in Ram Kishore

(Chuckcerbutty v. Kally Kanto (Chukerbutti 6 C. 479, which was accepted as good law in Premmoyi v. Preonath 23 C. 636, it is also opposed

to the cases of Dinanumi v. Elahudad 7 C.W.N. 678, and Dinamoni v. Elahudut. 8 C.W.N. 843. In the first of these cases, a Hindu widow had

instituted a suit to recover possession of property as part of the estate of her husband. The suit was dismissed with costs but before execution

could be taken out the widow died. The decree holder sought to take out execution against the reversionary heirs of the husband of the widow.

They resisted the claim on the ground that the decree was a purely personal one and could not be executed against the estate in her hands. This

contention was overruled. The learned Judges held that inasmuch as the widow did not seek to recover any interest personal to herself and

incurred liability for the judgment-debt in the effort to recover a portion of her husband's estate, it must be taken that the estate itself was liable for

the satisfaction of the judgment-debt. It was pointed out that it was only in her character as representative of the estate of her husband that she

instituted or indeed could have instituted that suit, and any land which she might recover in the suit would necessarily form portion of her husband's

ancestral estate which would be enjoyed by her during her lifetime and would at her death pass to the reversionary heirs. The case before us is

really much stronger than the one to which reference has just been made. In that case, the widow was unsuccessful, and the result of the litigation in

which she was made liable for costs showed that her claim was unfounded; yet the liability for costs which she incurred was thrown upon the estate

in the hands of the reversionary heirs. In the case before us, the ultimate result of the litigation showed that the claim was well founded; but the

costs for the recovery of which the disputed property was sold, were incurred by the widow by reason of a mistake she made in the choice of the

forum of litigation; the Court where she instituted the suit, it so turned out, had no jurisdiction to entertain it; and it is not suggested that the suit was

instituted in a wrong Court wilfully or capriciously. It seems to be obvious, therefore, that the decree for costs was capable of execution against the

estate of the husband in the hands of the widow. The authority of the widow to throw this liability upon the estate in her hands cannot be taken to

be more restricted than that of a Shebait to charge Debut-ter property under similar circumstances; and with regard to the powers of a shebait it

has been recently held in *Raja Pramada Nath v. Purna Chandra* 7 C.L.J. 514 that when a shebait has wrongfully taken possession of Immovable

property as part of the debutter estate and has consequently been made liable for mesne profits the decree must be taken to be not against the

shebait in his personal capacity so that the property of the idol is liable to make good the claim for mesne profits. It was pointed out by Mr. Justice

Doss that the liability of the estate of an idol for wrongs committed by its shebait in the reasonable management of its property may be assimilated

not only to the liability of a corporation for wrongs by its agents in the course of their employment and for the furtherance of its purpose, but also to

the liability of a trust estate for damages for wrongs committed by the trustee in the reasonable management of the trust estate. *Mersey Docks*

Trustees v. Gibbs L.R. 1. H.L. 93, *Taff Vale Railway v. Amalgamated Society* (1901) A.C. 426 In *re Raybald* 1 Ch. 199 So far as trustees are

concerned the well (sic) rule is that, if they are compelled to pay costs the amount paid may be allowed to them at their account, if the litigation was

just and proper; but the rule is otherwise, if the litigation was improper and vexatious. In other words, if the litigation was forced upon the trustee or

was necessary for the protection of the estate, the costs are recoverable from the estate; but, if the suit was improperly instituted; or costs had been

incurred by reason of his own misconduct, he must personally bear them; and whenever the costs are properly payable to the trustee out of the

estate, the execution creditor is entitled to be subrogated to his rights and to realize them from the estate. The principle is that in cases of

misconduct, where trustees are decreed to pay the costs of the suit, they cannot charge the expenses to the trust fund, on the ground that as the

misconduct was personal, the costs are personal also, and must be borne by them personally, *Attorney General v. Daugars* (1864) 33 Beav. 621:

55 E. R. 509; *Lathrop v. Smally* 23 N.J. Eq. 192. Prima facie, therefore, where costs are given against parties who are trustees, they must be

taken to have been given against them as trustees and not as individuals. We may refer also in this connection to the case of *Brigel v. Tug River*

Coal Company 73 Fed 13. There certain trustees had instituted an action in respect of properties which they held as trustees. The court of first

instance made a decree in their favour. The court of appeal reversed the decision on the ground that the first court had no jurisdiction to take

cognizance of the suit and allowed costs to the defendants as against the plaintiffs. The question arose, whether this was a decree against the

plaintiffs in their character as trustees or against them personally. It was ruled that the decree must be taken to have been made against them as

trustees on the ground that their standing in the court was as trustees and as they had no other standing the decree could not be taken to have been

made against them in their personal capacity. In our opinion, the position of a Hindu widow, so far as the present question is concerned, is not

inferior to that of a trustee for she represents the estate fully and the only limitation upon her title is that she has a qualified right of alienation. *Nobin*

Kishori, as we have already stated, commenced the litigation in her character as representative of the estate of her husband and for the benefit

thereof, and the decree for costs must be taken to have been made against her in that character.

4. The learned Vakil for the appellant argued, however, that, even though the decree against her (sic) taken to have been made in a representative

capacity, the execution proceedings show that the decree-holder did not intend to sell (sic) beyond her limited interest in the property and in

support of this position he relied upon the cases of *Baijun Doobey v. Brij Bhookun* 1 C. 133: L.R. 2 IndAp 275: 24 W.R. 306, and *Giribala v.*

Srinath 12 C.W.N. 769. In Our opinion, there is no force in this contention. The authorities on the subject were reviewed by this court in *Rai*

Radha Kissen v. Naoratun Lal 6 C.L.J. 490, and the rule laid down there is identical with what is deducible from *Jotendro Mohun Tagore v. Jugul*

Kishore 7 C. 357: 9 C. L. R. 57, which was confirmed by the Judicial Committee in *Jugal Kishore v. Jotendro Mohun* L.R. 11 I.A. 66: 10 C. 985.

The principle is that in order to determine the exact interest which passes at a sale in execution of a decree against a Hindu widow or a qualified

proprietor similarly situated the test to be applied is whether the suit in which the sale was directed was brought against the widow upon a cause of

action personal to herself or one which affect-ed the whole inheritance of the property in suit. Where it appears that the decree against the widow

is in respect of the husband"s estate and binds the reversionary heirs, the purchaser of her right, title and interest in execution takes the estate

absolutely. No inference can be drawn from the circumstance that the sale-certificate describes the property sold as right, title and interest of the

widow, because, as observed by Their Lordships of the Judicial Committee in many of the cases, although the right, title and interest of the widow

had been sold, the whole interest in the estate was held to have passed and the reversionary heirs were held to be bound by it, because the suit had

been instituted against the widow in respect of the estate or was for a cause which was not a personal cause of action against her. The decisions

referred to by the learned Vakil for the appellant are clearly distinguishable. In Baijun Doobey v. Brig Bhookun Lal Awusti 1 C. 133: L.R. 2

IndAp 275: 24 W.R. 306, the suit was to enforce the personal liability of the widow and consequently the execution in that suit passed merely the

widow"s interest. The case of Giribala v. Srinath 12 C.W.N. 769, upon which reliance was placed on behalf of the appellant as well as the case of

Kallu v. Faiyaz Ali 30 A. 394, similarly turned upon their special facts and in any event, if they lay down any rule inconsistent with the decision of

the Judicial Committee in Jugal Kishore v. Jotendro Mohun Tagore L.R. 11 IndAp 66; 10 C. 985, we are not bound by their authority. On all

these grounds, we must hold that in this particular case, in the circumstances we have set out, the execution sales upon which the title of the

plaintiffs is founded passed not merely the limited interest of Nobin Kishori, but the entire estate and are consequently binding upon the

reversionary heir and her representatives.

5. The third ground taken on behalf of the appellant raises the question of the extent of interest acquired by the plaintiffs by their purchase. It was

argued that so far as the one-sixth share of Brojo Nath, one of the sons of Gopal Chandra, is concerned, the plaintiffs have not acquired any valid

title. Brojo Nath, it appears, had executed a mortgage in respect of his share in favour of a person named Rameswar. The mortgagee obtained a

decree on his mortgage on the 26th December 1888. The property was brought to sale in due course in the Original Side of this Court and on the

18th March 1893, Benoy Krishna Mitter purchased it in execution. Meanwhile on the 22nd July 1892, the plaintiffs had purchased at the sale held

in execution of the decree for costs obtained by Kirti Bhusan the right, title and interest of Brojo Nath in the mortgaged properties. The question

arises, whether the purchaser at the mortgage sale is not entitled to precedence. In our opinion the purchaser at that sale has acquired an

indefeasible title which was in no way affected by the sale of the 22nd July 1892. It is now firmly settled, as laid down in the case of Surjiram

Marwari v. Barhamdeo Persad 2 C.L.J. 288 , that in the case of a mortgage suit lis continues after the decree nisi and the doctrine of Us pendens

is applicable to proceedings to realise the mortgage after the decree for sale. Consequently in the case before us, the Us pendens continued down

to the 18th March 1893, and the purchaser at the execution sale of the 22nd August 1892, was affected by it. In other words, when the mortgage-

sale took place on the 18th March 1893, it passed the equity of redemption to the purchaser, although in the meanwhile it had been transferred

from the mortgagor to the purchaser at the execution sale, who was no party to the proceedings and need not have been brought on the record.

We may add that it appears to have been also suggested before the Subordinate Judge that the Court could not take notice of the mortgage sale as

the sale certificate was not produced. This view is clearly wrong, for as pointed by this Court in *Tantardhari Singh v. Sunder Lal Missor* 7 C.L.J.

384, a purchaser of Immovable property at an auction sale can establish his title by evidence independently of the sale certificate, as a sale

certificate does not create title but is merely evidence of title. In this case, however, the sale certificate has been produced before this Court and

there can be no doubt that at the present moment the title acquired by Benoy Krishna at the mortgage sale is in full force and operation and must

take precedence over the title acquired by the plaintiffs at the execution sale of 1892. We must hold consequently that the claim of the plaintiffs in

respect of the one-sixth share of Brojo Nath must be disallowed.

6. The fourth ground taken on behalf of the appellant raises a question of estoppel. This question was not raised in the Court below and there are

no materials on the record upon which this Court can be invited to decide it. We must not, however, be taken to hold that there is any substance in

that contention. The plaintiffs have brought their suit within the Statutory period of limitation and it is, difficult to appreciate upon what principle they

can be held to be barred because the judgment-debtors have been allowed to continue in possession of the property. The fourth ground must

consequently be overruled.

7. The result, therefore, is that the decree of the Subordinate Judge must be varied to this extent, namely, the plaintiffs will have a decree for five-

sixths of the 5 anna share of the tank with the bank and garden. Their claim in respect of the remaining one-sixth will stand dismissed. The parties

will receive and pay costs in proportion to the extent of their success and failure throughout this litigation.