(1909) 01 CAL CK 0003

Calcutta High Court

Case No: None

Brojo Nath Pal		APPELLANT
	Vs	
Juggeswar, Bagchi and Others		RESPONDENT

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 be 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 a 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 arc 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 posts 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.