

(1920) 06 CAL CK 0010

Calcutta High Court

Case No: None

Ruhini Nandan Ghose and
Another

APPELLANT

Vs

Rajendra Nath Ghose

RESPONDENT

Date of Decision: June 1, 1920

Citation: 61 Ind. Cas. 291

Hon'ble Judges: Panton, J; N.R. Chatterjea, J

Bench: Division Bench

Judgement

1. The main question raised in the appeal is, whether the decree absolute for sale made on the 6th June 1903 in a suit on a mortgage was a nullity.
2. It appears that a preliminary decree on the mortgage was passed on the 27th February 1902 against the mortgagors, Preonath and Amulya, a minor who was represented by his guardian, Preonath, On the 12th July 1903; Preonath died but his heirs were not substituted on the record nor was any guardian ad litem appointed with respect to the minor Amulya. The decree absolute was made on the 6th June 1903; the property was sold on the 11th August 1903 under that decree and the sale was confirmed on the 5th September 1903. The present suit was instituted on the 16th August 1915 by the heirs of Preonath for a declaration that the decree absolute and the proceedings held there under were void.
3. The first Court dismissed the suit. On appeal the lower Appellate Court gave the plaintiff a decree.
4. The defendants Nos. 1 and 2, who purchased the property from the auction purchaser at the sale held in execution of the mortgage decree, are the appellants before us.
5. There can be no doubt that the Court had 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 decree or sale purporting to be made would be a

nullity and might be disregarded without any proceeding to Bt them aside see the case of Khairajmal v. Bairn 32 C. 296 : 2 A.L.J. 71 : 1 C.L.J. 584 : 7 Bom. L.R. 1 : 9 C.W.N. 201 : 32 I.A. 23 : 8 Sar. P.C.J. 734 (P.C.). We may also refer to the case of Rashid im-nitsa V. Muhammad Ismail Khan Ind. Cas. 864 : 31 A. 572 : 13 C.W.n. 1182 : 10 C.L.J. 318 : 6 A.L.J. 822 : 11 Bom L.R. 1225 : 6 M.L.T. 279 : 19 M.L.J. 631 : 36 I.A. 168 (P.C.) where the Judicial Committee held that, where a minor had not been properly represented in the litigation, a suit by her to set aside decrees and sales which had taken place in execution of them was not barred by Section 244, Civil Procedure Code. See also the case of Purna Chandra Karmar v. Bejoy chand 18 Ind. Cas. 859 : 17 C.W.n. 549 : 18 C.L.J. 18.

6. It is contended, however, on behalf of the appellant that, although the principles enunciated in these cases might be applicable to proceedings before the preliminary decree is passed, they are inapplicable to proceedings after the preliminary decree. This proposition is sought to be supported, upon the ground that it is not essential that a notice should be served upon the defendants before the decree absolute is made although the defendants may have the ex parte decree set aside if a proper case is made out.

7. The question, however, is not whether the service of a notice is a condition precedent to the validity of an order absolute for sale, but whether tiny proceedings could be carried on in the absence of the heirs of a deceased person or against a minor who was not represented on the record by his guardian ad litem. It is true that the decree absolute for sale carries out the preliminary decree, but no objection can possibly be raised to the decree being made absolute by persons who are not parties or not properly represented on the record. We think that the principles enunciated in the cases referred to above apply. The contention of the appellant must, therefore, be overruled.

8. The next contention is that, even if the decree absolute and the sale held there under be not binding upon the plaintiff, a declaration should be made that they are bound by the preliminary decree.

9. But the plaintiffs are in possession and the suit is merely for a declaration that the decree absolute for sale and the sale held there under are not binding on them. In such a suit, we do not see why any declaration should be made that they are bound by the preliminary decree.

10. This decision, however, will not affect the rights of the mortgagees, or persons claiming under them, from taking proper proceeding which they may be entitled to take under the law against the plaintiff. The appeal must be dismissed with costs Section A. No. 1720 OF 1918,

11. The above judgment governs this case. But it is contended on behalf of the appellant that the plaintiff in the suit out of which this appeal arises, was the attaching creditor of Amulya and as he has not acquired the right to radish u/s 91 of

the Transfer of Property Act, he is not entitled to maintain the suit.

12. The suit, however, is not one for declaration of his right to redeem but one for a declaration that Amulya, whose interest in the property he attached in execution of his decree was not affected by the decree absolute and the proceeding held there under at the instance of the defendant and if Amulya was entitled to such a declaration, we do not see why the attaching creditor cannot have the same.

13. This appeal also must accordingly be dismissed with costs.