(1927) 08 CAL CK 0016

Calcutta High Court

Case No: None

Tarangini Debi		APPELLANT
	Vs	
Raj Krishna Mondal and Others		RESPONDENT

Date of Decision: Aug. 15, 1927

Citation: 115 Ind. Cas. 520

Hon'ble Judges: George Claus Rankin, C.J; Mitter, J

Bench: Division Bench

Judgement

George Claus Rankin, C.J.
In this case the defendant, Tarangini Debi, appeals from a decision in a suit brought by the seven plaintiffs to set aside a decree and a sale held under the decree. The judgment debtor in the suit was one Juraram and the facts which are material for the present purpose are these that a decree was passed on the 13th of August, 1919; that on the 21st of January, 1920, in the lifetime of Juraram a sale proclamation and a notice of attachment were duly served upon the judgment-debtor. On the 2nd of February, 1920, Juraram the judgment-debtor died. The sale was held on the 19th of April, 1920, and the plaintiffs Nos. 1 to 3, the heirs of Juraram, complain that they were not made parties to the execution proceedings between the death of Juraram and the holding of the sale. On the 22nd of May, 1920, the sale was confirmed. In April, 1921, symbolical delivery was given to the decree-holder. On the 25th of June, 1921, the present appellant purchased the property from the decree holder. On the 24th of November, 1921, this suit was brought by the plaintiffs to set aside the decree and the sale held thereunder. Nothing need now be said as regards the allegation that the decree and the sale were secured by suppression of notice or by fraud. Both the Courts have negatived the existence of fraud. The sole question now is whether the fact that after the 2nd of February, 1920, these three heirs of Juraram were not made parties to the execution proceedings makes the sale invalid as against them: The learned Subordinate Judge took the view that they ought to have been made parties, secondly, as they had not been made parties the sale would be void so far as their

interest was concerned. Consequently these plaintiffs have to pay their share of the decretal dues and if they do so they are entitled to have the sale set aside.

2. In this appeal various cases have been cited before us and it is argued by the learned Vakil for the appellant that Section 50 read with Order XXII, Rule 12, Code of Civil Procedure, does not require in such a case that these heirs should have been made parties to the execution proceedings. He has contended secondly that even if that be the proper proceeding the failure to serve notice does not make the sale void as against those heirs but it is an irregularity relief against which can be obtained by an application under Order XXI, Rule 90 for setting aside the sale. In any case he says that such an application was time-barred at the date of the suit. We have to consider whether the absence of these parties from the execution proceedings rendered the proceedings null and void as against them; whether the sale was a good sale subject to it being shown that this irregularity has resulted in such an injustice as to entitle the parties to claim to have the sale set aside. The matter is complicated by differences of opinion and changes in law. The words ''fully satisfied'' in Section 50 were put in in substitution of the words ''fully executed'' for the purpose of negativing a decision of the Allahabad High Court, that when once a property was attached the decree was fully executed. On that old view there was a special reason for holding that where the judgment-debtor died after the attachment it was not necessary to bring his heirs on the record of the execution case. That special reason has been abolished by the amendment of the section. It remains to consider whether it is not right and proper in such a case as the present to bring the representatives of the judgment-debtor on the record before further prosecuting a sale. I agree with the contention of the learned Vakil for the respondent that it is proper to bring the representatives of the judgment-debtor in a case like this, on the record and that this should have been done. 1 do not agree that it is wholly unnecessary to bring the judgment debtor''s heirs on the record, I think it is an irregularity, when the judgment-debtor''s heirs are not so brought. The question then arises whether it is more than an irregularity and the first Court in this case has based its views very much upon the words used by Lord Davey delivering judgment in the Privy Counsel in the case of Khiarajmal v. Daim 32 0. 296 : 2 A.L.J. 71 : 1 C.L.T. 584 : 7 Bom. L.R. 1 : 9 Order W.N. 201 : 32 I.A. 23 : 8 Sar. P.C.J. 34 (P.C.). In that case the passage in question was directed to this position. There were certain shares belonging to one Naurez. A person Amir Baksh who was merely one of the heirs of Naurez and in no other sense a legal representative was impleaded. The suit proceeded without this particular man''s share being represented on the record of the suit at all; consequently so far as that man''s estate is concerned who never was a party from the beginning to end Lord Davey points out that the case of Malkarjan v. Narhari 25 B. 337 : 5 C.W.N. 10 : 10 M.L.J. 368 : 27 I.A. 216 : 7 Sar, P.C.J. 739 : 2 Bom. L.R. 927 (P.C.) has no application. He is pointing to something which cannot possible be denied. In the decision of the Privy Council in Khiarajmal''s case 32 0. 296 : 2 A.L.J. 71 : 1 C.L.T. 584 : 7 Bom. L.R. 1 : 9 Order W.N. 201 : 32 I.A. 23 : 8

Sar. P.C.J. 34 (P.C.) their Lordships think that the estate of Naurez was not represented in law or in equity and the sale of his property was, therefore, without jurisdiction and null and void. In the present case the judgment-debtor was the defendant in the suit which was decreed against him in his lifetime. The sale proclamation and the attachment were served upon him in his lifetime. Nobody suggests that the property which was Bold was not the property of Juraram. The only question is what is the effect, he being dead before the sale was complete, of not bringing certain heirs upon the record. Upon that question I think that Babu Jogesh Chandra has amply shown that the view of the Courts in India is that it is an irregularity and no more. The last case on the point is the case of Doraiswami v. Chidambaram Pillai 75 Ind Cas. 46 : 47 M. 63 : 45 M.L.J. 413 : 18 L.W. 577 : 33 M.L.T. 25: (1923) M.W.N. 817 : AIR 1924 Mad. 130. The head note runs thus: "Where a judgment-debtor died after proclamation of sale, and his legal representatives were not brought on record before the sale actually took place it was held that the sale was not a nullity and was not liable to be set aside." That has been the view which has been taken recently in this Court in the case of Hara Prasad Gain and Others Vs. Gopal Chandra Gain and Others, . It is the view that was taken previously in other cases. Particularly I would refer to the case of Jagadish Bhattaeharjee v. Rama Sundari Dasya 51 Ind. Cas. 972 : 23 C.W.N. 608 : 29 C.L.J. 411 where it was held that the omission was a mere irregularity which might lay the sale open to attack under the provisions of Section 311 of the Code of Civil Procedure.

3. The result is that in my judgment the old law of the Allahabad High Court which depended upon the words "fully executed can no longer be regarded. It is true that the heirs should be made parties to the execution proceedings. It is no true that failure in that respect necessarily involves that the sale is not binding upon the heirs.

4. In my judgment this appeal should be allowed and the plaintiffs" suit should be dismissed with costs in all the Courts.

Mitter, J.

I agree.