
(1896) 03 CAL CK 0018

Calcutta High Court

Case No: None

Net Lall Sahoo and
Others

APPELLANT

Vs

Sheikh Kareem Bux
and Another

RESPONDENT

Date of Decision: March 10, 1896

Citation: (1896) ILR (Cal) 686

Hon'ble Judges: Trevelyan, J; Beverley, J

Bench: Division Bench

Judgement

Trevelyan and Beverley, JJ.

The respondents in this case are two out of several judgment-debtors against whom a mortgage decree was made on 2nd June 1893. In that decree the judgment-debtor No. 8 was one Mussummat Makhduman, nika wife of Halim Chowdhry, deceased, and Nos. 9 and 10 were the two respondents, Karim Buksh and Mussummat Jaigia, who were described as minors under the guardianship of the said Mussummat Makhduman.

2. The decree having been made absolute on 29th July 1893, an order for sale of the mortgaged properties was made on 5th August, but on payment of part of the money due the sale was stayed, and the execution of the decree remained in abeyance. The balance of the decretal money not having been paid, the decree-holder on 25th June 1894 made a fresh application for sale, the judgment-debtors being described as in the decree and the former application. Meanwhile on 24th November 1893 Mussummat Makhduman had died, and no steps were taken either to substitute her legal representative on the record, or to appoint another guardian ad litem for the minors. The sale having taken place on the 7th August 1894, some of the other judgment-debtors applied on 3rd September to have the sale set aside under the provisions of Section 310A of the Code of Civil Procedure, and that application having been disallowed on the 5th September, the present respondents" on the following day, 6th September, preferred the present application under the provisions of Section 311 of the Code. The application was based on several

grounds which are considered at length in the order of the Subordinate Judge, by which he set aside the sale.

3. One of those grounds was that Mussummat Makhduman, who was, as already stated, one of the judgment-debtors under the decree, had died after the order for sale had been made, and that no one had been substituted as judgment-debtor in her place, nor had any fresh guardian ad litem been appointed for Mussummat Jaigia, who is admittedly a minor. Another ground was that the respondent Karim Baksh had been described in the proceedings throughout as a minor, although it was proved as a matter of fact that he was forty-five years of age. The learned Subordinate Judge also held that the sale was not duly published as provided by Sections 274 and 289 of the Code of Civil Procedure, and that the omission in the sale proclamation of the abwabs which were leviable in the bazaar sold was a serious omission. He also held that substantial loss had occurred to the judgment-debtors by the sale, and that such loss was entirely due to these irregularities.

4. As regards the first ground taken by the learned Subordinate Judge, it has been contended before us that so far from the sale being void, because Makhduman was dead at the time the property was sold and that no one had been put on the record in her place, the omission was not even an irregularity, but that the order for sale made during her life-time fixed upon the Court the responsibility of selling, and that no further proceeding was necessary at the instance of the judgment-creditors. In support of this contention Mr. Woodroffe relied on the Full Bench decision in Sheo Prasad v. Hira Lall ILR 12 All. 440 which was followed by the Bombay High Court in the case of Aba v. Dhonu Bai ILR 19 Bom. 276. On the other hand, a different view was taken in the case of Knshnayya v. Unnessa Begam ILR 15 Mad. 399, but in that case the Full Bench decision of the Allahabad Court was not considered. The case of Romeshurry Dasi v. Durga Dass Chatterjee 7 C.L.R. 85 also goes to support the contention that the omission to place the heir of Makhduman on the record would affect the regularity of the proceedings, but that case was decided upon a peculiar state of circumstances, and the sale was really set aside, because the process of the Court had been abused. We are of opinion that the omission did not vitiate the sale, but was at most an irregularity. The order for sale was made, and the former execution proceedings were taken, in the life-time of Makhduman. Her heirs appear to be also parties to the decree, and had they wished to satisfy the decree and save the property from sale (which, however, is not alleged), it was open to them to do so.

5. The absence of a guardian ad litem for Jaigia stands upon the same footing. The order for sale having been made when she was properly represented, it was binding upon her and if there had been any wish to satisfy the decree on her behalf, she could have applied to do so through a next friend, as in fact she has preferred the present appeal. Nor are we prepared to say that the description of Karim Buksh as a minor in any way affects the validity of the proceedings. This description may, indeed, be treated as surplusage, as was done in the case of Taqui Jan v. Obaidulla ILR 21 Cal. 866. Karim

Buksh now states that he never had any notice of the Suit, but the Subordinate Judge has not gone into that question, and we think that we cannot in an application u/s 311 of the Code go behind the decree and enquire as to whether or not he was served with a summons in the original suit.

6. The proceeding, which the law provides for relieving a person not served with a summons from the liability of a decree, is to-be found in Section 108 of the Civil Procedure Code. A proceeding u/s 311 must, we think, assume the regularity of the decree in execution of which the property has been sold. But whether that is so or not, we think that it is u/s 108 only that Karim Buksh is entitled to put forward any irregularity which he says was caused by his being described as a minor. But even assuming that the matters abovementioned were irregularities, they do not," in our opinion, justify the order setting aside the sale, inasmuch as we are not satisfied that the judgment-debtors have suffered any substantial loss by the sale.

7. Their Lordships then dealt with the evidence, and came to the conclusion that the judgment-debtors did not sustain any substantial loss in consequence of the sale, and set aside the order of the Court below, and directed that the application u/s 311 be dismissed with costs.