Mohan Chunilal Vs Digambar Shankar

Court: Bombay High Court

Date of Decision: June 27, 1944

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Section 48

Citation: AIR 1945 Bom 445 : (1945) 47 BOMLR 277

Hon'ble Judges: Macklin, J; Lokur, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Lokur, J.
This appeal arises out of a suit for a declaration that the sale of Survey Nos. 121 and 127 of Utran in darkhast No. 87 of 1935

is illegal and not binding on the plaintiff, and for an injunction restraining the defendants from taking possession of them. The facts of the case are

undisputed. Of the two lands in suit Survey No. 127 was the ancestral property of one Shankar Sampat Patil, and Survey No. 121 belonged to

the defendants who agreed to sell it to Shankar Sampat Patil for Rs. 7,000. Under that agreement Shankar was to pay Rs. 4,000 at once, and the

balance of Rs. 3,000 with interest within a year. Shankar paid Rs, 4,000 to the defendants in January 1921, and took possession of the land, but

he failed to pay the balance, and died in February, 1923. He left no issue; and his heirs were his two widows, Sakhubai and Banubai, but his

mother, Rangubai, having taken wrongful possession of his property, Sakhubai and Banubai filed a suit against her and recovered possession of the

property. In the meantime the defendants filed Suit No. 46 of 1925 against both the widows and Rangubai to recover the unpaid purchase-money

and obtained a decree for Rs. 3,000 with interest on January 30, 1926. By executing the decree in two darkhasts, one in 1926 and the other in

1927, the defendants were able to recover Rs. 975. Thereafter the senior widow, Sakhubai, took the plaintiff in adoption on September 11, 1928.

Banubai having disputed his adoption, Sakhubai, as his next friend, filed Suit No. 870 of 1928 and obtained a decree for possession against

Banubai and others on April 29, 1930. She executed that decree in darkhast No. 735 of 1980, and recovered possession of Shankar''s property

as the minor plaintiff''s guardian.

2. Even after the adoption, the defendants gave a darkhast in 1929 against the original judgment-debtors, and succeeded in recovering Rs. 692-7-

6 on August 30, 1930. In that darkhast Sakhubai did not put forward the plaintiff''s adoption, nor did she do so in the next darkhast which was

filed in 1933 and proved abortive. The last darkhast No. 87 of 1935 also was presented against the original judgment-debtors, and after the

proceedings went on for nearly three years, Sakhubai for the first time contended on October 4, 1938, that, as she had taken the plaintiff in

adoption, the names of herself and her co-widow, Banubai, should be struck off from the darkhast. By that time the decree had already become

more than twelve years old, and as the lands, Survey Nos. 121 and 127, which had been taken out for sale in that darkhast, had not yet been

transferred to the plaintiff''s name, the defendants refused to join the plaintiff as a party to the darkhast or to strike out the names of Sakhubai and

Banubai. The plaintiff also did not make any application to be joined as a party to the darkhast. So the darkhast was proceeded with against the

original judgment-debtors alone, and Survey Nos. 121 and 127 were sold in auction to the defendants on October 21, 1938, the former for Rs.

3,641 and the latter for Rs. 2,401. Then the plaintiff through his natural father as his next friend brought this suit

3. Various contentions were raised by the defendants. But the only one that survives in this appeal is whether Shankar''s estate was sufficiently

represented in the darkhast by his widows so as to make all the proceedings and the auction sale binding on the plaintiff. The trial Court held that it

was not and decreed the plaintiff''s claim.

4. In coming to that conclusion the trial Court relied upon the rulings in Malkarjun v. Narhari I.L.R (1900) 55 Bom. 337 : S.C. 2 Bom. L.R. 927

and Shankar Daji v. Dattatraya Vinayak (1921) ILR 45 Bom. 23 Bom. L.R. 514. The principle laid down in Malkarjun v. Narhari has no

application to the facts of this case. In that case in execution of a mortgage decree the sale took place after notice had been wrongly served upon a

person who was not really the legal representative of the deceased judgment-debtor''s estate. But the executing Court having erroneously decided

that he was to be treated as such representative, the sale was upheld notwithstanding that irregularity. In the present case no finding was ever

recorded by the executing Court that after the plaintiff''s adoption Sakhubai and Banubai were representatives of Shankar''s estate. In Shankar

Daji v. Dattatraya Vinayak the decree-holder applied for execution of his decree against the property of the deceased judgment-debtor after,

bringing the latter''s brother''s widow on record as his legal representative and purposely ignoring the bequest made by him by a will in favour of his

mistress. The auction sale held in those proceedings was held to be not binding on the said mistress on the ground that the decree-holder was

endeavouring to acquire a right to the debtor''s property in fraud of the legatee. In that case the interests of the deceased judgment-debtor''s

brother''s widow, who was made a party to the darkhast, were adverse to those of the legatee and Macleod C. J. observed (p. 1194):

On the general aspect of the proceedings there seems little doubt that the decree-holder arid the plaintiffs were acting in collusion in order to obtain

title to the suit property by a Court sale.

5. In the present case there was no such collusion between the original judgment-debtor Sakhubai and the defendants; on the other hand Sakhubai

was trying to guard the interests of her adopted son by not raising any objection until twelve years had elapsed after the passing of the decree, and

a fresh darkhast became barred u/s 48 of the Civil Procedure Code. In all the litigation carried on by her for the recovery of her husband''s

property for the benefit of her adopted son, she represented herself as his guardian and there was no conflicting interest between her and her son.

Hence the principle laid down in Shankar Daji v. Dattatraya Vinayak does not help the plaintiff in this case.

6. The case more in point is Devji v. Sambhu I.L.R (1899) Bom. 135 : S.C. 1 Bom. L,R, 627. In that case one Ghanu having died indebted, his

widow mortgaged his lands and house to pay off his debt. He had left two minor sons, who were then the real owners of the property.

Subsequently a money decree was obtained against the widow for another debt due by her husband, and the equity of redemption in the

mortgaged property was sold by auction in execution of that decree and was purchased by the mortgagee, the defendant. The sons were not made

parties to the execution proceedings, and yet it was held that the sons were bound by the sale. It was observed that obviously, if the sons had been

parties to the suit in which the decree had been passed, they would have appealed by their mother as their guardian and there was no reason to

suppose that anything would have been differently done in the suit, if she had been described as their guardian instead of being treated as the

representative of the estate. The sons were therefore held to be substantially represented in the suit, and the sale and the execution proceedings

were treated as valid, unless the sons were able to show that their father''s debt, which was the foundation of the decree, was of such a nature that

no liability arising from it could attach to the family property. The trial Court distinguished this case on the ground that there was nothing in it to

show that the decree-holder had intentionally refused to bring on record his sons who were his true legal representatives as in the present case. It is

true that in the present case the defendants knew in the course of the execution proceedings that Sakhubai had put forward the plaintiff as her

adopted son, but she was all along representing him as his guardian. The case of Devji v. Sambhu was decided on the general principles laid down

in Ishan Chunder Mitter v. Buksh Ali Soudagur (1863) 1 Mar 614 and The General Manager of the Raj Darbhunga v. Maharajah Coomar

Ramaput Sing (1872) 14 M.I.A. 605. In Ishan Chunder"s case, which is the earliest one mentioned in the reports, it was held that a decree

obtained against a Hindu widow as representing the estate of her deceased husband would be binding on the son though he was not a party to the

suit. It would seem from the reports that the plaintiff knew the existence of the son and even then had sued only the widow. The judgment says that

the question for consideration was whether the widow sufficiently represented the estate of the deceased. This is really the point that is to be

decided in cases of this description. The Privy Council entirely approved of this decision in The General Manager of the Raj Darbhunga v.

Maharajah Coomar Ramaput Singh. There the suit was brought against a widow as a guardian of her son, who was then a minor to recover

arrears of rent due from the father. It was held by the Judicial Committee that the decree obtained against the widow was as legal representative of

the father and was binding on the son who was the true and legal representative of the deceased, though the suit was not prosecuted against him.

7. It is admitted by the plaintiff"s natural father that Survey No. 121 stood in the name of defendant No. 1 at the time of the auction sale, and

Survey No. 127 even now stands in the name of Sakhubai and Banubai. Thus Sakhubai and Banubai really represented the estate, and even if

Sakhubai was described in the darkhast as the guardian ad-litem of the minor plaintiff, the result would have been the same. It is pointed out by

Mr. Dixit that in that case the defendants could not have obtained permission under Order XXI, Rule 72, of the Civil Procedure Code, 1908, to

bid at the sale from the Mamlatdar under the High Court Civil Manual, Vol. I, Chapter II, Rule 15, page 92, but that would not have debarred him

from obtaining that permission from the Court itself. If the minor plaintiff had been made a party in the beginning, he would naturally have applied to

the executing Court to grant him permission, and there is no reason why the Court should have refused to grant it. It is also pointed out that

Sakhubai and Banubai did not object to Survey No. 121 being sold for Rs. 3,641 only though it had been purchased for Rs, 7,000. But it is not

shown that the land which was valued at Rs. 7,000 in 1921, continued to be of the same value in 1938. The land was duly valued by the panchas,

and no evidence has been led to show that the estimate made by the panchas was wrong. It must, therefore, be held that Sakhubai sufficiently

represented the estate, and in the absence of fraud or collusion, the proceedings in execution and the auction sale are binding on the plaintiff.

8. It is true that the auction sale has resulted in a great hardship for the plaintiff. Shankar purchased Survey No. 121 for Rs. 7,000 out of which he

paid Rs. 4,000 in cash. For the unpaid balance the plaintiff has not only lost the entire purchased land but also his ancestral land, Survey No. 127.

On the other hand it would be hard on the defendants also if the sale is set aside, since they will thereby lose their land Survey No. 121 for Rs.

4,000 only, though they had sold it to Shankar for Rs. 7,000 in 1921 and had immediately put him in possession of it. They were kept out of the

balance for seventeen years, and during all those years Shankar and his successors were in possession of it. It is pointed out that at the auction sale

in 1938 both the Survey Nos. 121 and 127 were sold out for Rs. 6,042 only, though Survey No. 121 alone was worth Rs. 7,000 in 1921. No

fraud or collusion on the part of the judgment-debtors is alleged, and the value of the land may have gone down between 1921 and 1938. The

plaintiff could have saved the lands by paying the defendants the amount due under that decree; but he is not prepared to do so even now. It

cannot therefore be said that the equity lies wholly in his favour. Once it is held that Shankar''s estate was sufficiently represented in the darkhast

and that the auction sale in the darkhast was not vitiated by any fraud or collusion, the plaintiff is not entitled to have it set aside on the technical

ground that he was not a party to the darkhast.

9. We therefore allow the appeal and dismiss the suit, but in the peculiar circumstances pointed out above, we direct that the parties shall bear their

own costs throughout.

Macklin, J.

10. I agree. My learned brother has pointed out in his judgment that considerable hardship must inevitably be caused to the losing side, whichever

it might be. The matter was argued at great length nearly two years ago, and the issue throughout was in doubt. At the request of the learned

advocates on both sides the bench (of which I was a member) postponed orders in the case in order to give the parties an opportunity of

compromising, since that was the only way in which it was possible for each side to obtain substantial satisfaction. The matter came up before us

again in the last week and was again heard at some length, though not perhaps at the length at which it was heard on the former occasion. The

issue however (as was obvious to the learned advocates on both sides) was no longer in doubt. Nevertheless because we felt that a decision in

favour of the defendants would cause hardship to the plaintiff, who for the sake of paying the unpaid purchase price of the property bought by his

adoptive father would be compelled to lose not only that property but other property as well, we decided in consultation with the learned

advocates that a further effort should be made to compromise, and we again postponed orders. We are told that the defendants, who have

ultimately succeeded in this matter, had no objection to compromise; but the plaintiff, with an obstinacy which is unfortunately all too common

among litigants who come before this side of the High Court, and presumably in defiance of the advice of his learned advocate, refused to

compromise. The result is that he loses not only property for which he had already given a substantial sum in part payment but other property as

well; and he also loses the benefit of the Rs. 4,000 of the purchase price which was paid to the defendants about seventeen years ago.

11. Speaking for myself, I feel no sympathy for him; and I trust that in future when learned advocates advise their clients to compromise a matter

(as I am sure was done in this case), especially when they do so at the suggestion of the Court, clients will show more sense than has been

displayed by the plaintiff in this litigation.