Inder Pal Singh vs Babu Singh And Ors. on 7 October, 1955

Equivalent citations: AIR1956ALL218, AIR 1956 ALLAHABAD 218, 1956 ALL. L. J. 228

JUDGMENT

Upadhya, J.

1. This is a plaintiff's appeal arising out of a suit for a declaration that the plaintiff was the owner of one-sixth share in a certain grove, for an injunction restraining defendants 1 and 2 from butting away the trees and for damages. The allegations were that the grove belonged originally to one Mt. Umeda Kuer who had got it by a gift deed dated 7-2-1898, and was thus the absolute owner of the grove. Mt. Umeda Kuer made a Will in favour of Gajraj Singh, the plaintiff's father, and Mullu Singh, her, brother. After Umeda Kuer's death the heirs of Gajraj Singh and Mullu Singh inherited the property.

2. There was a decree against Mt. Umeda Kuer and it appears that it was put into execution and the grove was sold on 19-1-1943. The auction purchaser sold the trees to defendants 1 and 2 who started removing them and thereupon the plaintiff being aggrieved filed a suit claiming a declaration and an injunction as mentioned above and Rs. 117/- as damages by way of compensation for his share of the trees that had been cut and removed away.

3. The suit was contested on various grounds. It was alleged that the grove did not belong to the plaintiff inasmuch as by reason of the auction sale in execution of the decree against the plaintiff's testator the entire property had been sold away and the above auction purchaser was perfectly entitled to sell away the trees to defendants 1 and 2. The main question that arose for decision was whether the plaintiff's share in the grove in suit had been validly sold away.

Incidentally arose the question as to whether the plaintiff was properly represented in the execution proceedings in which the sale had taken place. The plaintiff alleged that his mother had been appointed a certificated guardian by an order dated 8-12-1938 and it was not open to the executing Court to appoint Brij Bhukhan Singh, the plaintiff's guardian-ad-litem while the certificated guardian was alive and had not been removed.

The trial Court took the view that there was no valid appointment of a guardian of the plaintiff who was a minor in the, execution proceedings in which the sale of the grove had taken place. As such, the execution sale was not binding upon him. The trial Court also took the view that because the plaintiff derived his title under a will it was in the nature of an independent title and he was not a legal representative of Umeda Kuer and the property acquired under the sale by him could not be put to sale in the execution proceedings.

The learned Munsif decreed the suit. On appeal the lower appellate Court held that the appointment of Brij Bhubhan Singh as guardian-ad-litem, while the plaintiff's mother was the certificated guardian was a mere Irregularity, and the execution proceedings could not be taken to be absolutely null and void.

The Court further held that the view taken by the trial Court that the property which the plaintiff had derived under the will was not liable to sale in execution of a decree against Umeda Kuer his testator had no foundation in law. The lower appellate Court, therefore, allowed the appeal and dismissed the plaintiff's suit.

4. The plaintiff has now come up in appeal to this Court. Mr. B.D. Gupta, learned counsel for the appellant, has pressed the contention that the appointment of Brij Bhukhan Singh was bad in law. He has invited my attention to the provisions of Order 32, Rule 3, which read as follows:

> "Rule 3. (1) Where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor.
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> (2) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff.
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> (3) Such application shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse, to that of the minor and that he is a fit person to be so appointed.
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> (4) No, order shall be made on any application under this rule except upon notice to the minor and to any guardian of the minor appointed or declared by an authority competent in that behalf, or, where there is no such guardian, upon notice to the father or other natural guardian, of the minor, or, where there is no father or other natural guardian, to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub-rule.
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> (5) A person appointed under Sub-rule (1) to be guardian for the suit for a minor shall, unless his appointment is terminated by retirement, removal or death, continue as such throughout all proceedings arising out of the suit including proceedings in any appellate or revisional Court and any proceedings in the execution of a decree".

5. Learned counsel argues that the Court should not have made an appointment without issuing notice to the guardian of the minor appointed by the District Judge under the Guardians and Wards Act. He urges that the order passed by the Court is contrary to the provisions of Order 32, Rule 3(4) and, therefore, no valid appointment should be considered to have been made.

Reliance is also placed on Order 32, Rule 4(2) which lays down that 'where a minor has a guardian appointed or declared by competent authority, no person other than such guardian shall act as the next friend of the minor or be appointed his guardian for the suit unless the Court considers for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act or be appointed, as the case may be.

6. It is urged that the appointment as made was bad in law and even if the appointment was validly made Brij Bhukhan Singh should have stopped acting as a guardian-ad-litem as soon as an order was passed by a competent authority appointing the plaintiff's mother as his certificated guardian. It was also contended that the plaintiff haying received the property in dispute under a will was not bound to pay the decree which stood against Umeda Kuer.

7. The lower appellate Court has found as a fact after perusing the application for execution and other relevant papers that Brij Bhukhan Singh was appointed guardian-ad-litem of the plaintiff much earlier than 8-12-1938, when the certificate of appointment as guardian was granted to the plaintiff's 'mother. Obviously, in these circumstances, the provisions of Order 32, Rule 3(4) requiring the issue of notice to the certificated guardian cannot be said to have been contravened.

Alter Brij Bhukhan Singh was appointed a guardian-ad-litem, he continued to be the guardian by virtue of provisions of Order 32, Rule 3(5) already quoted above. That rule says that the guardian appointed shall continue as such throughout all proceedings arising in the case and that his appointment is to terminate only by retirement, removal or death.

None of these three contingencies happened and it is difficult to accept the contention that because of the provisions of Rule 4(2) Brij Bhukhan Singh could not act as guardian after the appointment of a certificated guardian of the minor. Rule 3(5) does not mention the appointment of a certificated guardian as an event which would bring about the termination of the appointment of the guardian-ad-litem.

8. Order 32, Rule 3(4) also requires that the order appointing a guardian-ad-litem shall be passed only after notice to the father or other natural guardian of the minor. Admittedly the plaintiff's mother was his natural guardian alive at the time when Brij Bhukhan Singh was appointed his guardian-ad-litem. There is no proof that notice was issued to her. Learned counsel urges that this provision is imperative and inasmuch as the notice required was not issued to the plaintiff's mother, Brij Bhukhan Singh's appointment is invalid in law.

Consequently it is argued that the plaintiff cannot be said to have been properly represented in the execution proceedings & the sale is not operative so far as his interest in the property is concerned. It is also contended that the Court below has erred in treating the defect in Brij Bhukhan Singh's appointment as merely an irregularity but the plaintiff is entitled to treat the sale relied upon by the other side as a mere nullity.

9. The validity of the sale as against the plaintiff depends on the validity of the order passed by the executing Court appointing Brij Bhukhan Singh as the plaintiff's guardian-ad-litem. If the order of

appointment can be treated as a nullity, the plaintiff would be justified in refusing to recognise the auction sale. This leads us to the important question as to whether the order of appointment of the guardian-ad-litem Was a nullity or it was merely an order passed without observing the rules of procedure prescribed and notwithstanding such irregularity, is an order because of which the plaintiff should be considered to have been properly represented in the execution proceedings.

A clear distinction has to be drawn between a judgment or an order which is void and one which is voidable. An erroneous order is a voidable order for the argument presupposes the existence of the jurisdiction of the Court passing it and also that the procedure prescribed has been followed. The order is erroneous because it is either contrary to facts or to law and an appellate or revisional authority may reverse it. An irregular order or judgment is also voidable.

But the distinction is that while an erroneous order will always be reversed by an appellate authority, an irregular order will be reversed on appeal or ignored in a collateral proceeding only when it is shown that the irregularity in the proceeding has affected the merits of the case between the parties. An order that is void, however, is one where the Court passing it had absolutely no jurisdiction to pass the order. Such an order or judgment passed without jurisdiction has been held in law to be a mere nullity.

The person who is sought to be affected by it need not proceed to have it set aside, he may merely discard it. In order to establish that the appointment of Sri Brij Bhukhan Singh was an order which could be ignored as a mere nullity, the plaintiff ought to have shown that the Court had no jurisdiction to pass that order. Once it is found that the Court making the appointment- had Jurisdiction to do so, the error made by him in not following the rules prescribed by the Code of Civil Procedure cannot have the effect of taking away that jurisdiction.

The rules prescribed do nothing more than lay down the mode in which the jurisdiction is to be exercised. It would be certainly proper to follow these rules. Not following them would be evidently irregular. It is well-settled that a mere irregularity in procedure or error in deciding a case or passing an order will not make the decision or order absolutely inoperative in law. In considering the question a distinction has to be drawn between the .existence of Jurisdiction and the exercise of jurisdiction.

Where the Jurisdiction does not exist the. decision or order is evidently void. But where the Court does possess the jurisdiction to try a case and passes an order, an irregularity or error in making the order amounts only to an error or an irregularity in the exercise of jurisdiction and the order passed cannot be said to be a mere nullity.

10. In 'Malkarjun v. Narhari', 25 Bom 337 (PC) (A), the Court had to decide whether a sale which took place after notice had been wrongly served on a person who was not the legal representative of the judgment-debtor's estate could be considered a nullity. The relevant facts in that case were that the judgment-debtor one Nagappa having died, the decree-holder applied for execution against the estate of the defendant Nagappa, deceased represented by his heir and nephew Ramalinga.

A year having elapsed since the decree, notice was issued under Section 248, Civil P. C. This notice, however, was issued to Ramalinga, the nephew of Nagappa. Ramalinga appeared and informed the Court that the heirs of Nagappa were his daughters and that he was not the heir of Nagappa nor was he in possession of his estate. The Court informed him that the application was not against his property, but against the estate of. the deceased and if his property was attached he could take objections as provided in law.

An attachment was made and a sale took place and the defendants in the case who had a mortgage on the property purchased it. The heirs of Nagappa brought a suit for redemption ignoring the sale that had taken place. In order to succeed it was necessary for them to establish that the. sale was a nullity and the defendants contended that however erroneous the order of the Court might have been in effecting the sale of the property in a proceeding, not against the heirs of Nagappa but against a stranger, the Court acted with Jurisdiction and it could not be said that the sale was a nullity.

This argument of the defendants was accepted by the Judicial Committee of the Privy Council. In delivering the judgment Lord Hobhouse observed:

> "It is not disputed that if the Court took proceedings wholly without jurisdiction the plaintiffs would remain unaffected by them, and two of the learned Judges below go the whole length of affirming that the execution Court had no jurisdiction. But a decree had been made, and partially, though to a minute extent, executed against Nagappa; and his estate was liable to make good the balance. To enforce this liability was within the jurisdiction of the Court.
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> If a judgment-debtor dies before full execution of a decree the creditor may apply for execution against his legal representative. To receive that application is part, of the Court's jurisdiction. In point of fact the application made was against "the estate of Nagappa", and in another column Ramlingappa is named as his heir. The Court had jurisdiction to receive such an application and either to reject it as defective or to order some further proceeding.
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> If Ramlingappa had actually been successor in title nobody could have objected to the regularity of the proceedings. If there had been a dispute who was heir or whether the property had or had not devolved upon the heir, it was for the Court to determine such matters for the purpose of the execution. If it had been found impossible to discover whether any represents tive of the deceased was in existence, it was for the Court to say what steps should be taken.
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> All these matters, which might involve questions of nicety, were for the Court to decide. It is clear that the jurisdiction was not lost for the reason that the form of application might be open to exception. How was it lost afterwards?

"The Code goes on to say that the Court shall issue a . notice to the party against whom execution is applied for. It did issue notice to Ramlingappa. He contended that he was not the right person, but the Court having received his protest decided that he was the right person, and so proceeded with the execution. In so doing the Court was exercising its jurisdiction. It made a sad mistake, it is true; but a Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right; and if that course is not taken the decision, however wrong, cannot be disturbed. The real complaint here is that the execution Court construed the Code erroneously. Acting in its duty to make the estate of Nagappa available for payment of his debt, it served with notice a person who did not legally represent the estate, and on objection decided that he did represent it. But to treat such an error as destroying the jurisdiction of the Court is calculated to introduce great confusion into the administration of the law.

Their Lordships agree with the view of the learned Chief Justice that a purchaser cannot possibly judge of such matters, even if he knows the fact; and that if he is to be held bound to inquire into the accuracy of the Court's conduct of its own business no purchaser at a court-sale would be safe. Strangers to a suit are justified in beiieving that the Court has done that which by the directions of the Code it ought to do."

11. In 'Hriday Nath Roy v. Ram Chandra', AIR 1921 Cal 34 (FB) (B), a Pull Bench of the Calcutta High Court considered whether an order , for withdrawal of a suit with leave to institute a fresh suit passed without anything to indicate that the Court was satisfied that the suit must fail by reason of some formal defect was void and the view taken was that the order could not be held to be passed without jurisdiction and was therefore not null and void.

12. In an illuminating judgment passed by Das J., in -- 'Satdeo Naraln v. Ramayan Tewari', AIR 1923 Pat 242 (2) (c), the effect, of an omission to issue notice to a guardian under Order 32, Rule 3 (4) was considered and the view taken was that the jurisdiction of the Court could not be held to be ousted because the Court had not followed the proper procedure prescribed under the Code for the appointment of the guardian-ad-litem. It may be mentioned that where a decree is passed without summons being properly served on a defendant, the decree remains binding until it is set aside by ah application showing the non-service of summons or by an appeal.

Such a decree is not a nullity unless it is proved that the non-service of summons was due to fraud. I do not see how any distinction can be drawn between non-service of summons and the non-strvice of a notice on a natural guardian under Order 32, Rule 3 (4). The failure to serve the summons as well as the notice is a failure to follow the procedure prescribed. It is evidently an irregularity. In following the procedure the Court has the necessary jurisdiction; the defect lies in the mode adopted to exercise it.

It may also be noticed that Section 99, Civil P. C., lays down that no decree shall be reversed or substantially varied, npr shall any case be remanded in appeal on account of any misjoinder of parties or causes of action or any error, defect or irregularity in :any proceedings in the suit, not

affecting the merits of the case or the jurisdiction of the Court. This provision undoubtedly relates to the powers of an appellate Court but it shows that distinction between lack of jurisdiction and wrong exercise of it has been recognized by the Code of Civil Procedure.

13. Learned counsel for the appellant has drawn my attention to a Division Bench case of this Court in -- 'Mt. Chambi v. Tara Chand', AIR 1924 All 892 (D), in support of his contention that the plaintiff who was a minor was not properly represented in the execution proceedings in which the property was sold and therefore the sale is a nullity as against the plaintiff.

In that case the facts were that Mt. Chambi had sued Banarsi Das and others for partition of a house and the proceedings in the suit had completed in the trial Court on 20-3-1917. 30-3-1917- was fixed for delivery of judgment but Banarsi Das having died in the meantime, Mt. Chambi applied to the Court to bring Tara Chand on the record in place of his adoptive father Banarsi Das.

Tara Chand engaged a pleader and contested the suit. A preliminary decree was passed on 14-4-1917, and a final decree followed on 21-6-1917. Tara Chand himself preferred appeals from both the decrees but was unsuccessful. Thereafter it struck Tara Chand that some years prior to his adoption his natural mother had been appointed his guardian under the Guardians and Wards Act and because of that fact he could attain majority only when he had attained the age of 21 years.

He attained the age of 18 years on 13-11- 1917 and was a minor on the date when the) decree was passed against him. He brought suits challenging all the decrees aforesaid alleging that he was not represented at all and could not be treated as having been a party to them. The defendants in the qase contended that the plain tiff had not been prejudiced in any way for want of the appointment of a guardian and that he was able to conduct his defence effectively him self and that the suit was barred by the rule of estoppel.

A Bench of this Court deciding the case took the view that the decree passed against the plaintiff was a nullity because he was a minor and was not represented by any guardian in the case at all and was therefore no party to it. The view taken was that there was nothing to differentiate the case of a decree passed against a dead man from a decree passed against a living man who was no party to it.

14. The learned Judges took the view that on the facts of the case it was not possible to hold that the case was one of a mere irregularity in following the appropriate procedure. This case to my mind has no application to the facts of the present case. The plaintiff of the present case was a party to the execution proceedings and there was in fact a guardian appointed to look after his interest. What is questioned is the propriety or legality of that appointment and as mentioned above the irregularity made in not following strictly the procedure prescribed cannot have the effect of making the order a mere nullity.

Learned counsel for the respondent has relied upon two cases. One is the decision of a Division Bench of this Court in -- 'Dammar Singh v. Pirbhu Singh', 4 All LJ 155 (E), Stanley C. J., in dealing with the provisions of Section 443 of the old Code which required that where a certificated guardian existed, the Court could not appoint any other person, except for reasons to be recorded, as

guardian-ad-litem of the minor, held that the violation of that provision was "merely an irregularity, and, as such, does not of itself vitiate either a decree passed in a suit or a sale consequent upon such a decree."

15. The other case placed before me is the case of -- 'Dharampal Singh v. Mool Chand', AIR 1942 All 248 (F). Allsop J., delivering the Judgment held:

> "The appointment by the Court of a person other than the guardian appointed by competent authority under the Guardians and Wards Act is a mere irregularity and does not vitiate the . whole proceeding, when the person appointed by the Court is not absolutely disqualified from representing the minor but is one whom the Court in its discretion could appoint to represent the minor but might not have appointed, if it had been aware of all the relevant facts such as that a guardian for the minor had already been appointed by a competent authority under the Guardians and Wards Act."

The execution sale which was sought to be declared void in that case was upheld. I respectfully agree with the above observations.

16. The other point raised by the learned counsel was that the share in the grove in dispute had come to the plaintiff under a Will and it was not liable to be sold in execution of the decree in that suit against the testator. No authority has been cited for this proposition and to my mind I cannot see how a person talcing property under a Will can claim to be free from liability to pay off the debts of the testator, particularly when it had taken the form of a decree which had been put into execution.

17. I, therefore, see no reason to interfere with the decision of the lower appellate Court and the appeal is dismissed with costs.

18. Leave to appeal is refused.