

Nathumal vs Mohd. Nazir Beg And Anr. on 21 July, 1955

Equivalent citations: AIR1955ALL584, AIR 1955 ALLAHABAD 584

JUDGMENT

Mootham, C.J.

1. This is an appeal, by leave, from a judgment of learned Judge of this Court dated 5-12-1947.

2. On 24-1-1941, the appellant purchased from one Kailash Chand the latter's two-thirds share of a house. Thereafter the appellant brought a suit against the respondents for partition of his two-thirds share. The suit was contested, the second respondent's defence being that he was the owner of Kailash Chand's two-thirds share, having purchased that share at two sales in execution of two decrees obtained against Kailash Chand, then a minor.

He purchased a half share on 5-4-1939, and the remaining one-sixth share on 16-8-1940. In answer to this defence the appellant averred that the decrees on the basis of which the sales to the second respondent were effected were void, as Kailash Chand was not properly represented in the suits. It is common ground that Kailash Chand was a minor on 24-1-1941, the date of the conveyance to the appellant.

3. We are concerned in this appeal only with the validity of the acquisition by the second respondent, on 5-4-1939, of the minor's half share.

4. The decree was passed ex parte by a Revenue Court on 14-11-1938, and the lower Courts have, found not only that service of notice on the proposed guardian was defective but that no order had been made by the Court under Order 32, Rule 3 appointing a guardian for the suit for the minor. "The whole case", in the words of the learned District Judge, "was conducted with complete indifference to the interests of the minor."

These conclusions have not been challenged before us.

5. In these circumstances there can, we think, be no doubt that the decree passed against the minor by the Revenue Court was void. Order 32, Rule 3, provides that "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."

If a guardian has been appointed by the Court and if owing to his gross negligence a decree is obtained against the minor, that decree will be voidable and not void, for the minor is a party to the decree: -- 'Rameshwar Prasad v. Ram Chandra', AIR 1951 All 372 (FB) (A).

But if no service has been effected on the guardian and the Court has not appointed a guardian the minor is not represented in the suit at all and he is accordingly not a party to the suit in the proper sense of the term; and if he be no party to the suit a decree passed against him in that suit is passed without jurisdiction and is null and void: -- 'Rashid-Un-nissa v. Muhammad Ismail Khan', 36 Ind Ann 168 (PC) (B); -- 'Partab Singh v. Bhabuti Singh, 40 Ind App 182 (PC) (C).

6. Learned Counsel for the respondent has sought to argue, on the basis of -- 'Walian v. Banke Behari', 30 Ind App 182 (PC) (D), that the absence of an order of appointment renders the decree voidable only and not void. In our opinion Walian's case (D) is clearly distinguishable. In that case service on the minors' mother who was named as their guardian had been effected through the minors' major brother who was the manager of the joint Hindu family of which the minors were members, and although no formal order had been made appointing the mother as guardian, she had effectively represented them in the suit, and with the sanction of the Court.

It was in these circumstances that the Privy Council held that the absence of a formal order of appointment was not fatal to the suit unless it was shown that that defect prejudiced the minors. In the present case, as we have already pointed out, no service was effected on the guardian at all and the proceedings in the Revenue Court were conducted with complete indifference to the interests of the minor.

7. The learned single Judge allowed the respondent's second appeal on the ground "a third person who has taken a transfer from the minor cannot come forward and claim avoidance of a decree passed against the minor, even though the decree may have been passed in an irregular manner, on the ground that the decree was void ab initio", and he was accordingly of opinion that the purchaser was not entitled to obtain possession without the minor first having taken steps to avoid the decree.

We are unable to agree with this view. In our opinion a void decree is a decree which has no existence in the eye of the law and is a decree which therefore may be ignored; see AIR 1951 All 372 at p. 373 (A). It was not therefore necessary, in our opinion, for Kailash Chand on attaining majority to file a suit to have the decree declared void; he was entitled to disregard it.

8. In the result this appeal is allowed with costs; the judgment of the learned single Judge is set aside and that of the lower appellate Court restored.