

Chhitar Vs. Jai Singh and ors.

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Court : Allahabad

Decided On : Mar-09-1939

Reported in : AIR1939All507

Appellant : Chhitar

Respondent : Jai Singh and ors.

Judgement :

ORDER

Mulla, J.

1. This is an application in revision under Section 115, Civil P.C. It arises out of a proceeding under the Encumbered Estates Act. The applicant Chhitar, who is a minor, brought a suit on the basis of a mortgage against the opposite party, Jai Singh, and obtained a preliminary decree on 29th January 1935 which was eventually made final on 30th November 1935. His mother Mt. Bhudei acted as his guardian for that suit. Some time after the passing of the preliminary decree but before the preparation of the final decree the opposite party, Jai Singh, along with some other members of his family made an application under Section 4, Encumbered Estates Act, on 10th September 1935. It is noticeable that this fact was not brought to the notice of the Court which had passed the preliminary decree and was proceeding to prepare the final decree. It appears that the opposite party, Jai Singh, did not put in his appearance in the course of the

proceeding for the preparation of the final decree. That absence may well have been intentional, for if he had appeared in the course of that proceeding and brought it to the notice of the Court that he had made an application under Section 4, Encumbered Estates Act, which had been sent by the Collector in due course to a special Judge the proceeding would have been stayed at once under Section 7, Encumbered Estates Act, and the applicant would have had notice of the application made by the opposite party under the Encumbered Estates Act and would have consequently been vigilant to prefer his claim before the special Judge. It has been suggested on behalf of the applicant and I think not without some force that the opposite party, Jai Singh, made his application under Section 4, Encumbered Estates Act, quietly with the deliberate intention of keeping that fact from the knowledge of the present applicant and later on got a notice of his application published in the Government Gazette in the name of Mt. Bhagwan Dei and not of Mt. Bhudei, the name clearly mentioned in the preliminary and the final decrees referred to above. It must also be mentioned in this connexion as a very significant fact that the present applicant was the only creditor mentioned in the application under Section 4, Encumbered Estates Act. The special Judge ordered a notice to be published in due course in the Government Gazette in the name of Mt. Bhagwan Dei in accordance with the particulars supplied by the opposite party Jai Singh. That notice was published on 22nd February 1936.

2. It appears that in accordance with Section 9(2), Encumbered Estates Act, the Special Judge also sent a copy of the notice by registered post to Mt. Bhagwan Dei. On behalf of the applicant it is alleged that no such notice was actually tendered to Mt. Bhudei, the mother of the applicant who had acted as his guardian in the mortgage suit. Both the Courts below have however found that Mt. Bhudei refused to accept delivery of the registered notice presumably on the ground that the person to whom the notice was addressed was Mt. Bhagwan Dei. The result of this proceeding was that no written statement was filed on behalf of the applicant before the Special Judge within three months from the date of the publication of the notice in the Government Gazette as required by Section 9(1) and as the applicant was the only creditor the proceeding came to an end and his debt was taken under Section 13 of the Act to have been duly discharged. Now the applicant's case is that he had no knowledge of all this and when his uncle Shadi

Earn made a demand on 2nd May 1937 from the opposite party, Jai Singh, for payment of the decretal amount he was told that the debt had been discharged in consequence of an application having been made under Section 4, Encumbered Estates Act, and no written statement of the claim having been filed within the time allowed by law. There upon the applicant under the guardianship of his uncle Shadi Earn put in a petition on 3rd May 1937 along with a written statement of his claim based upon the final decree asking the Special Judge to condone the delay and to permit him to put in his claim. It was definitely alleged in that petition that the opposite party had been guilty of fraud and the applicant had been prevented by that fraud from having any knowledge of the proceeding under the Encumbered Estates Act. The Special Judge rejected the petition holding that he had no power to extend the limitation beyond the period of five months provided for in Sub-section (3), Section 9, Encumbered Estates Act. That view has been upheld by the learned District Judge of Bulandshahr in appeal, hence the present application in revision.

3. The argument on behalf of the applicant is that the whole proceeding before the Special Judge subsequent to the opposite party's application under Section 4, Encumbered Act, was void because no step was taken by the Court to appoint a proper guardian to represent the present applicant who is admittedly a minor. It is pointed out that Rule 6 of the Rules made under the Encumbered Estates Act provides that:

Proceedings under this Act shall be governed by the provisions of the Civil Procedure Code of 1908 for the time being in force so far as they are applicable and not inconsistent with the provisions of the Act and of these Rules.

4. It is further urged that Section 141, Civil P.C., makes the procedure provided in the Code in regard to suits applicable to all proceedings in any Court of civil jurisdiction. It is urged upon these grounds that it was incumbent upon the Special Judge to appoint a guardian of the present applicant for the purposes of the proceeding before ordering the publication of a notice in the Government Gazette under Sub-section (1), Section 9, Encumbered Estates Act. It appears from the judgment of the learned District Judge that the same argument was pressed

before him and he was inclined to hold that it was the duty of the Special Judge to proceed under Order 32, Rule 3, Civil P.C., to appoint a guardian of the present applicant; but for reasons which I am entirely unable to appreciate he finally arrived at the conclusion that the omission on the part of the Special Judge to follow that procedure did not justify any condonation of the delay in filing the written statement on behalf of the applicant. The relevant portion of the judgment of the learned District Judge runs as follows:

It was the Court's obvious duty to have appointed a guardian for the purposes of these proceedings. But because the Court failed in its duty the parties cannot be made to suffer. The minor had obtained both a preliminary and a final decree in respect of his claim under the guardianship of his mother Mt. Bhudei. A notice of these proceedings had actually been sent to this lady. She refused to accept this notice on a pretext which is sufficient to alienate whatever sympathies a Court of law might have had for her. The notice was presented to the lady on some date in February 1936. Her guardianship was not impugned till more than a year afterwards. The minor also could have come forward with an application for the appointment of a proper guardian within a reasonable interval. Had some action been taken by or on behalf of the minor, in order to have his status defined, there would have been some meaning in all these technicalities which have to-day been raised. But nothing was done and fifteen months after the notice had been issued a written statement was attempted to be filed for the registration of a claim. I do not think these facts would justify a condonation of the delay.

5. Most of the observations made by the learned District Judge seem to me to be entirely beside the point. The simple question for consideration before him was what was the effect of the omission on the part of the Special Judge to follow the procedure laid down by Order 32, Rule 3 with regard to the applicant. According to the learned District Judge himself the parties could not be made to suffer for the failure in its duty on the part of the Court, but that is exactly what has happened in the present case, for the present applicant who is admittedly a minor and was not represented at all in the proceeding before the Special Judge, has been deprived of the fruits of his decree. I have no hesitation in holding that a proceeding under the Encumbered Estates Act is a proceeding in the nature of a suit to which the

provisions of Order 32, Rule 3, Civil P.C., are applicable by virtue of Rule 6 of the Rules framed under the Encumbered Estates Act and Section 141, Civil P.C. The failure to follow the mandatory provisions of Order 32, Rule 3 necessarily vitiates the whole proceeding so far as the present applicant is concerned. No notice was ever sent to the applicant as required by Sub-section (2) of Section 9, Encumbered Estates Act, and he was not a party to the proceeding at all. No argument is needed in these circumstances to justify the conclusion that the proceeding in question cannot affect his right in any way. It was argued on behalf of the opposite party that the application of Order 32, Rule 3, Civil P.C., was subject to the limitation provided in Rule 6 of the Rules framed under the Encumbered Estates Act in the following terms:

So far as they are applicable and not inconsistent with the provisions of the Act and of these Rules.

6. It was also urged that a similar limitation is contained in Section 141, Civil P.C., in the words 'As far as it can be made applicable.' I do not find any force in this argument, for I see no inconsistency of any kind between the provisions of Order 32, Rule 3 and the provisions of the Encumbered States Act or of the Rules framed thereunder. The whole basis of the period of limitation prescribed in Sub-section (3), Section 9, Encumbered Estates Act, is the presumption that when a thing is published in the Government Gazette every one concerned in the matter has knowledge of it. It is obvious that such a presumption cannot possibly be drawn against a minor. I do not find the slightest justification for holding that the Encumbered Estates Act contemplates that a proceeding can be instituted against a minor creditor without any step being taken either by the applicant or by the Court to appoint a proper guardian of the minor. The result therefore is that I allow this application and setting aside the orders passed by the Courts below direct that the case shall be sent back to the Special Judge who shall proceed to appoint ii guardian of the applicant in accordance with the law and to admit and decide the claim made on his behalf. The applicant shall have his costs from the opposite parties.