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Court : Allahabad

Decided On : May-10-1927

Reported in : AIR1927All601

Appellant : Bachan Singh

Respondent : Bhika Singh

Judgement :

Iqbal Ahmad, J.

1. While I am anxious not to, in any way, abridge the effect of Section 100 of the Civil P.C., and not to depart from the well-established rule that findings of fact recorded by a Court of first appeal are binding in second appeal, I cannot, in view of the equally well-established rule, that inference from proved facts is always a question of law, affirm the finding or the decision of the lower appellate Court in this case. After an examination of the record I have come to the conclusion that the findings recorded by the learned Judge of the lower appellate Court are not borne out by the facts found by him, and that the conclusion at which the trial Court arrived was correct.

2. One Ganga Din obtained a simple money decree against Chandan Singh, father of the defendant-respondent, on the 28th of February, 1910. Before the decree could be executed, Chandan Singh died, and the defendant-respondent, who was then a minor and is still a minor, was brought upon the record as a judgment-

debtor in place of his father. The father's sister of the defendant was appointed defendant's guardian ad litem. On the house in dispute being attached by Ganga Din in execution of his decree, an objection was preferred in the execution department by the defendant's guardian ad litem, questioning the right of the decree-holder to sell the house in dispute on exactly the same grounds on which the present suit was resisted by the defendant-respondent. It appears that the objections that were taken were not pressed and were eventually disallowed and the house in dispute was sold in execution of Ganga Din's decree and purchased by the plaintiff-appellant on the 7th of November, 1913. The plaintiff-appellant made no attempt to take possession of the house for a period of about 11 years and instituted the present suit for possession of the house on the 11th of January 1924.

3. One of the pleas urged in defence was that Chandan Singh, the defendant-respondent's father, was a drunkard, a spendthrift and a man of loose character, and the debt in respect of which the decree was obtained by Ganga Din was tainted with immorality. This common form of defence, which is usually taken by a Hindu son in order to deprive a creditor of the debts advanced by him to a Hindu father, totally broke down in the trial Court, and no attempt was made to challenge the finding of the trial Court on the point in the lower appellate Court.

4. The suit was resisted on two other grounds, viz:

(1) All the proceedings have been taken in collusion with Puttu Singh, the certificated guardian of the contesting defendant, and brother-in-law (sister's husband) of the plaintiff, and the defendant is not bound by the same, and the plaintiff is not entitled to a decree for possession of the house; and

(2) that the house in dispute belonged to and was in occupation of the defendant as an agriculturist, and as such, was not liable to sale in execution of the decree held by Ganga Din, in view of the provisions of Section 60(c) of the Code of Civil Procedure.

5. Both these contentions were over-ruled by the trial Court and the plaintiff's suit was decreed. On appeal by the defendant the lower appellate Court has differed

from the trial Court on both the points and has held that

the house in suit is an agriculturist's house as contemplated in Section 60, Civil P.C., and it could not be sold in execution of the simple money decree against the minor's father and that its sale was brought about fraudulently.

6. As already remarked above I am unable to accept these findings of the lower appellate Court as binding on me in second appeal. The learned Subordinate Judge who decided the appeal was of opinion that, notwithstanding the fact that the defendants guardian ad litem in the execution proceedings had objected to the attachment and sale of the house on the ground that the house was an agriculturist's house, and that objection was not given effect to by the execution Court because of the failure of the defendant's guardian ad litem to diligently prosecute the case the defendant, because of his minority, was entitled to question the validity of the execution sale on the ground that the sale of the house was in contravention of the provisions of Section 60(c), Civil P.C.

7. I am unable to agree with the lower appellate Court. It is not suggested that the guardian ad litem (father's sister) of defendant, who acted as defendant's guardian ad litem in the execution case, was in collusion with Ganga Din or the present plaintiff, or was in any way prevented by any person from duly protecting the interests of the defendant. It cannot be denied that the defendant was represented by a duly constituted guardian in the execution proceedings, and the mere failure of the guardian to diligently prosecute the case on behalf of the defendant cannot have the effect of vitiating the order of the execution Court. The only duty cast upon a litigant by law is that he must see that a minor, who is party to a suit or proceeding in a Court of law, is represented by a duly constituted guardian, but there is no obligation on him to see that the guardian ad litem vigilantly prosecutes the case on behalf of the minor. Undoubtedly a guardian ad litem is bound to protect the interests of a minor by raising and substantiating appropriate pleas on his behalf, but this duty is not shared by the minor's adversaries in the suit. A decree obtained against a minor who was represented by a duly constituted guardian is binding on the minor unless there is something to show that there was any fraud on behalf of the guardian. This was the view taken by this Court in the

cases of Chander Sekhar Tewari v. Balakdhar Dube [1912] 10 A.L.J. 149 and Beni Prasad v. Lajja Ram [1916] 38 All. 452. In my opinion, the mere fact of the defendant's minority is not a sufficient ground for differentiating the present case with the case reported as Lala Ram v. Thakur Prasad [1918] 40 All. 680. I, therefore, hold that the plea that the house in dispute was an agriculturist's house could not be raised in the present suit and was barred by the principle of constructive res judicata.

8. Moreover, it appears to me that the finding of the lower appellate Court that the house in dispute is an agriculturist's house is an impossible finding. The lower appellate Court has assigned two reasons for recording a finding on the point in the defendant's favour. It has observed:

Firstly, from the respondent's own statement made before me recorded on paper No. 58-A it is clear that the defendant-appellant is an agriculturist. He has no other source of income, A pure and simple zemindar is to be taken as an agriculturist in the absence of any legal definition to the contrary. Secondly, from the same statement of the respondent-appellant it is also evident that the house in suit is the only dwelling house that he has now got and in it his father, Chander Singh lived. The other one that he had, fell into ruins.

9. A reference to paper No. 58-A upon the record shows that the summary of the statement of the plaintiff given by the learned Subordinate Judge is entirely at variance with the statement made by the plaintiff. The plaintiff stated that

the sir and khudkasht of Bhika Singh (defendant) is let out on rent. No other business except zamindari is carried on by the minor. The zamindari of the minor is looked after by Hardeo Singh who is my brother-in-law and who is the guardian of the minor.

10. The only conclusion that can be drawn from this statement of the plaintiff is that the defendant is not an agriculturist. It is clear the plaintiff nowhere committed himself to the statement that the defendant's source or chief source of livelihood was by cultivating land. On the contrary it appears that cultivation was not carried on by the minor and his source of income was from the zamindari land. This being

so it cannot be held that the house in dispute is an agriculturist's house. It has been pointed out in the case of *Lachhman Das v. Mt. Partapi*, that

an agriculturist is not a person who obtains his livelihood otherwise than by cultivating himself or through his servants even if he may have some sort of interest in a field or two.

11. An agriculturist whose house is protected from attachment and sale by Section 60(c) of the Civil P.C. must be an agriculturist belonging, to the class of persons who are ordinarily designated as agriculturists, that is whose principal source of livelihood is by cultivation. Cultivation to a certain extent is carried on by most, if not all the zamindars, in this province, but their houses cannot be designated as agriculturists' houses. The view that I take finds support from the decision in the case of *Ashmat Ullah Sarkar v. Ran Mohammad Choudhary* [1916] 20 C.W.N. 874.

12. It is also well established that

the party who alleges himself to be an agriculturist must prove that he earns his livelihood wholly or principally by agriculture or that he ordinarily engages personally in agriculture labour: *All India Reporter* 1923, Bombay, p. 12.

13. The assumption made by the lower appellate Court in the present case that the defendant-respondent's only source of income is from cultivation is without foundation as the defendant-respondent owns zamindari property, and it cannot be said that the house did not belong to and was in his occupation as a zamindar.

14. In arriving at the finding that the house in dispute is an agriculturist's house the lower appellate Court has not referred to the oral evidence adduced by the defendant. But I, for the sake of satisfying myself as to the accuracy or otherwise of the finding of the lower appellate Court on the point, have looked into the evidence produced by the defendant respondent. The evidence consists of the statement of two witnesses named Khannu Singh and Hori Singh and both these witnesses were examined mainly with a view to support the plea of the defendant-respondent as to the immorality of his father. Hori Singh stated that Chandan

Singh used to look after the work of his zamindari and that there is still zamindari and sir. Khannu Singh's statement was that Chandan Singh had kasht sir and occupancy holdings. It does not appear from the statements of these two witnesses that the main source of livelihood of Chandan Singh and the defendant-respondent was from cultivation. Even if it be held that Chandan Singh was both an agriculturist and a zamindar, the burden of proving that the house in dispute was strictly of the nature contemplated by Section 60(c) of the Civil P.C. was on the defendant-respondent: vide the case of Jamna Prasad Raut v. Raghunath Prasad [1913] 35 All. 307.

15. It is not denied that the plaintiff'-appellant was not a party to the suit brought by Ganga Din and purchased the house in dispute in execution of the decree held by Ganga Din. He was justified in believing that the house was saleable in execution of the decree, vide the case of Pandurang v. Krishnaji [1904] 28 Bom. 125.

16. For the reasons given above I am unable to accept the finding of the lower appellate Court that the house in suit was an agriculturist's house within the meaning of Section 60(c) of the Civil P.C. I am equally unable to affirm the proposition of law propounded by the lower appellate Court that

a pure and simple zamindar is to be taken as an agriculturist in the absence of any legal definition to the contrary.

17. In my opinion the presumption is the other way. A zamindar must be taken to be a zamindar unless his main source of income is proved to be from cultivation.

18. In support of the finding that 'the sale of the house in dispute was brought about fraudulently' the lower appellate Court has assigned the following reasons:

(1) The plaintiff-respondent is the brother-in-law (wife's brother) of the appellant's certificated guardian, Hardeo Singh, who did not agree to look after the appellant's interest in the case.

(2) 'The purchase of the house by the appellant-respondent looks to be suspicious' inasmuch as the plaintiff had purchased certain zamindari belonging to the defendant 'and afterwards quietly transferred it to his sister, wife of the appellant's-

defendant's guardian (Hardeo Singh alias Putto Singh) who is himself residing in the house to the exclusion of the defendant.

(3) That the suit was brought more than 10 years after the purchase and, therefore, 'may be reasonably presumed to have been inspired by the same self-seeking certificated guardian' of the defendant and it would not be surprising if the plaintiff after his success in the litigation transfers the house also to his sister.

(4) 'The circumstances denote that the guardian is pulling the strings from behind with a view to depriving the minor of his ancestral dwelling-house in which he has comfortably nestled himself.' It appears impossible to me to infer fraud from the facts found or the reasons assigned by the lower appellate Court.

19. No particulars of the alleged fraud were given in the written statement, and none were disclosed in the evidence produced by the defendant-respondent, and nobody in this Court has been able to let me know the particulars or the precise nature of the fraud found by the lower appellate Court.

20. It is clear from a reference of the statement of Hardeo Singh, dated the 20th of February 1924, that he was not a certificated guardian of the defendant at the time that Ganga Din executed his decree and the plaintiff purchased the house in dispute. It is true that in the suit, giving rise to the present appeal, Hardeo Singh, notwithstanding the fact that he was a certificated guardian of the defendant, refused to act as his guardian ad litem. But this refusal of Hardeo Singh can in no way lead to the inference that the sale that took place in 1913 when Hardeo Singh had nothing to do with the defendant was brought about fraudulently. It appears to me that Hardeo Singh was well advised, having regard to his relationship with the plaintiff-respondent, in not acting as guardian ad litem of the defendant in the present suit. In any case his refusal to so act in the present case or his desire that the plaintiff should succeed in the present litigation cannot lead to the inference that the sale of 1913 was a fraudulent sale.

21. I am unable to appreciate the ground on which the learned Subordinate Judge has held the purchase of the house made by the plaintiff to be suspicious, and there is no warrant for the assumption that after succeeding in the present

litigation the plaintiff will transfer the house to his sister, the wife of Hardeo Singh. Even if it be assumed that Hardeo Singh is now anxious to get possession of this house and that it was he who asked the plaintiff to purchase the house in 1913, the purchase made by the plaintiff at a time when. Hardeo Singh was not a certificated guardian of the defendant, cannot be held to be vitiated by fraud. It is needless to point out that fraud must be specifically pleaded and each particular thereof must be strictly proved. I have examined the evidence in the case and I find that there is not an iota of evidence to suggest that the sale of 1913 was brought about by fraud and in my judgment the finding of the lower appellate Court on the point is based on pure conjectures, and is bad in law.

22. For the reasons given above I allow this appeal, set aside the decree of the lower appellate Court and restore the decree of the trial Court with costs in all Courts.

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