

Tika Ram Vs. Teja

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Court : Allahabad

Decided On : Jul-04-1923

Reported in : (1924)ILR46All32

Judge : Walsh and ;Ryves, JJ.

Appellant : Tika Ram

Respondent : Teja

Judgement :

Walsh and Ryves, JJ.

1. The facts, as now found, under which this appeal arises are as follows:

2. Nanhe and Teja were brothers who together formed a joint Hindu family. They owned an ancestral house, On the 4th of February, 1908, Nanhe mortgaged the whole house to Tika Ram. Tika Ram sued on his mortgage and got a preliminary decree for sale in 1912. Before Tika Ram could get an order for sale under Order XXXIV, Rule 5, Teja, the other brother, brought a suit to avoid the mortgage on the ground that Nanhe, as a member of an undivided joint Hindu family, could not make a valid mortgage of the ancestral house without his consent and in the absence of legal necessity, and for a declaration that the house could not be sold under the mortgage decree. That suit was decreed on the 4th of January, 1913. Thereupon Tika Ram abandoned his rights under the mortgage, and asked the

court, then seised of the execution proceedings, to pass a decree under Order XXXIV, Rule 6, and that was done. The effect of that was to give Tika Ram a simple money decree against Nanhe. It is to be noted here that Nanhe was a party to these proceedings. He did not contest the application, nor did he appeal from the order passed. It is also to be noted that Tika Ram's suit was brought within 6 years of the mortgage and that he was entitled, at the date of his suit, to get a simple money decree, if the mortgage on the basis of which he sued was found to be for any reason invalid. In execution of that decree the right, title and interest of Nanhe in the house in suit was put up for sale and was purchased by Tika Ram, who then brought a suit for partition of half the house on the allegation that Nanhe's right, title and interest in the whole house amounted to half. Teja, having failed to set aside the sale in the execution department, filed a counter suit for a declaration that the auction sale in favour of Tika Ram was invalid and that he (Tika Ram) was not entitled to partition the house. Both suits were tried together. The trial court decreed Teja's suit and dismissed Tika Ram's. Tika Ram appealed. The lower appellate court dismissed Teja's suit and remanded Tika Ram's suit to the first court to carry out the partition. Teja appeals from that order of remand in this case and in the connected second appeal which is also before us.

3. The main contention is that the decree passed under Order XXXIV, Rule 6, was a nullity as being beyond the jurisdiction of the court, and that it, therefore, conveyed no title to Tika, Ram, on the ground that there having been no confirmation of the preliminary decree and no sale under Order XXXIV, Rule 5, the court had no jurisdiction to grant a decree under Order XXXIV, Rule 6; and reliance was placed on a recent decision of this Court in the case of *Darbari Mal v. Mula Singh* (1920) I.L.R. 42 All. 519. It seems to us that that case has no application here, because in that case it was the judgment-debtor who objected to the passing of the decree under Order XXXIV, Rule 6. In this case no doubt Nanhe might, if he had been so advised, have raised an objection to the court passing this decree, or he might have appealed from that decree. But it seems to us that inasmuch as he (Nanhe) has accepted that decree, Teja cannot challenge it. We will assume that it is correct to say that a decree under Order XXXIV, Rule 6, should only be passed when there has been a sale over, and that the decree in this case under Order XXXIV, Rule 6, was erroneous. It seems to us, however,

that the well-known Privy Council case of *Malkarjun v. Narhari* (1900) I.L.R. 25 Bom. 337 applies to this case. Here (as there), the court passed an order which, it may be conceded, it should not have passed, having regard to the provisions of the Code. But it was seised of the execution of the case and it did pass that decree. Whether that decree was right or wrong, it not having been challenged by Nanhe, the party concerned, it seems to us that he, and any one who stands in his shoes, as we think Tika Ram does in this case, cannot go behind it. So far as the appellant is concerned, he challenges the title of Tika Ram to ask for partition or to stand in any way, so far as he, Teja, is concerned, in the capacity towards him of a co-sharer. But the result of the views expressed in the foregoing observations is that Tika Ram, although in the inception his title was impeachable, has now acquired an absolute title which is good against all the world, and, therefore, good against Teja.

4. Teja, in equity, has really no case. If Teja had asked to be joined as a defendant in Tika Ram's suit in 1912, as he could have done, and raised the same defence that he subsequently raised, Tika Ram might have abandoned the mortgage and asked for a simple money decree against Nanhe as he was entitled to do (the suit having been brought within 6 years of the bond), and if so, he probably would have got, as he was entitled to get, a simple money decree against Nanhe. In execution of that decree he could undoubtedly have attached and sold Nanhe's share in the house, and if he purchased it, he would have been entitled to partition the house. We cannot see under the actual circumstances of this case that Teja's interests are damnified. On a partition Teja is only entitled to half the house. Nanhe could have partitioned it, and Nanhe's representatives can do so also. No injustice is done to Teja. The half share of Teja in the house is not imperilled. But Teja cannot be allowed 'to pull the chestnuts out of the fire' for Nanhe's benefit.

5. No doubt it is very inconvenient for Teja that the ancestral house should be partitioned, but to avoid this he has only to pay up the debt due by Nanhe, his brother. The learned Counsel for the respondent says that his client will not press his right to partition the house, if his debt is paid up in full to date. This seems to us to be the most natural and satisfactory solution of a litigation which does not impress us as being particularly honest on Teja's part.

6. The other points raised, though pressed by Mr. Haribans Sahai with his usual ability and pertinacity, are, in our opinion, untenable.

7. We dismiss the appeal with costs. This judgment covers the connected second appeal which we dismiss with costs.

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