

Bishrup Vs. Nil Kanth

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Court : Allahabad

Decided On : Apr-14-1914

Reported in : AIR1915All265; 29Ind.Cas.595

Judge : Henry Richards, C.J. and ;P.C. Banerji, J.

Appellant : Bishrup

Respondent : Nil Kanth

Judgement :

1. This appeal arises out of a suit in which the plaintiff Bishrup by his guardian, Ram Sarup, seeks to set aside a sale-deed dated the 6th October 1906 and a decree which was subsequently obtained by the defendant for possession of the property, the subject-matter of the sale-deed. It is alleged in the plaint that Bishrup was at the time of the sale a person of unsound mind incapable of understanding what he was doing; that the defendant fraudulently took advantage of his infirmity and induced him to execute the sale-deed : that no consideration was given : that the property was worth Rs. 10,000, while the amount of consideration was only Rs. 5,500. Then follows paragraph 5 of the plaint, which contains allegations which under certain circumstances might have been of considerable importance. It is there alleged that the defendant brought a previous suit on the 4th of May 1909 against Bishrup as a person of sound mind, while he well knew that he was a person of unsound mind, that by fraudulent means he made a man of the name of Bhola Nath pairakar for Bishrup who did not put forward a proper defence on

behalf of Bishrup. It appears that a suit was brought by the defendant against Bishrup on the 4th May 1909 seeking possession of the property, the subject-matter of the sale-deed. Bishrup put in a defence to that suit, alleging that he was of weak intellect and that advantage had been taken of him and that he had not received the consideration. The sale was challenged on the same grounds as in the present suit, save the ground which relates to the value of the property. The case was tried by the Subordinate Judge of Cawnpore who went into all the facts and held, first, that Bishrup was not of unsound mind, and secondly, that the full consideration had been paid. There was an appeal to the High Court by Bishrup in his own name. After considering the evidence the High Court confirmed the decision of the Court below granting the plaintiff a decree for possession of the property. The Court below in the present suit framed six issues. The first issue was whether the suit was barred by Section 11 of the Code of Civil Procedure. There was no issue based upon the allegations contained in paragraph 5 of the plaint.

2. The learned Subordinate Judge decided that the previous litigation operated as *res judicata*. It is contended here that if Bishrup was in fact of unsound mind at the time the previous suit was instituted then the decision cannot possibly bind him and it is then pointed out that since the previous litigation an enquiry has been held by the District Judge at Cawnpore and that Bishrup has been adjudged a person of unsound mind and his mother appointed guardian of his person and Ram Sarup guardian of his property. On behalf of the appellant we are asked to infer from the judgment of the District Judge that Bishrup must have been of unsound mind when the previous litigation was instituted. Sections 440 to 462 of Act XIV of 1882 (which was in force at the time of the previous litigation) provide how suits are to be brought by and against minors. Section 463 of the same Act enacts that the provisions contained in Sections 440 to 462, both inclusive, shall *mutatis mutandis* apply in the case of persons of unsound mind adjudged to be so under Act XXXV of 1858 or under any other Act for the time being in force. In the present Code the provisions relating to suits by and against minors are applied not only to persons adjudged to be of unsound mind, but also to persons who are found by the Court on enquiry to be incapable of protecting their interests when suing or being sued, by reason of unsoundness of mind or mental infirmity, see Order XXXII, Rule 15. Bishrup had not at that time been adjudged a person of

unsound mind. He, therefore, was a party to the, previous litigation and is prima facie bound by the result. In this view the finding of the Court below, that the previous litigation operated as res judicata is correct.

3. It is said, however, that a decree obtained by fraud cannot operate as res judicata and that the Court ought to have taken evidence of the allegations contained in paragraph 5 and that the case should be sent to the Court below for that purpose. There are two objections to this contention. In the first place, the plaintiff's advisers do not appear to have asked the Court to frame any issue on the question of fraud in connection with the previous litigation. Even in the memorandum of appeal to this Court this ground is not taken. The reasonable inference to be drawn from this is that the advisers of the plaintiff in the Court below : felt that it would be impossible to sustain the allegations in paragraph 5. The whole history of the previous litigation renders it extremely improbable that the plaintiff could have adduced evidence to support the allegation that the previous suit was not fairly fought out, far less that the plaintiff in that suit by fraud prevented it from being fairly fought out. Even granted that Bishrup was not a man of strong intellect, it is quite clear that every possible defence that could be put forward on his behalf was put forward. Witnesses were called as to the condition of his mind and evidence was given as to the giving back of parts of the consideration. Legal gentlemen were employed not only in the Court of first instance but also in the High Court.

4. Under these circumstances, we do not think that the omission by the plaintiff's advisers to ask the Court to frame an issue on the ground of fraud was an accident or that we ought how to allow any such matter to be gone into. We dismiss the appeal with costs.