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Court : Kolkata

Decided On : Apr-16-1945

Reported in : AIR1945Cal456

Appellant : Manindra Kumar De and anr.

Respondent : Satish Chandra De and ors.

Judgement :

1. This appeal arises out of a suit instituted by two plaintiffs to set aside a sale held in execution of a certificate under the Public Demands Recovery Act. The plaintiffs alleged fraud, and fraudulent suppression of processes, and on behalf of plaintiff 2 a further ground was taken. It is not disputed that at the time when the certificate was made he was a minor and that no guardian had been appointed to represent him in the proceedings, in the certificate itself it was made to appear that this plaintiff was sui juris. It was accordingly contended that the sale was not binding as against him.

2. The trial Court decreed the suit in favour of plaintiff 2, and he was given joint possession of the property in question along with the purchaser thereof. The trial Court however dismissed the suit of plaintiff 1. Two appeals were preferred to the learned District Judge, one by the purchaser and the other by plaintiff 1. The learned District Judge allowed the former appeal but dismissed the latter, the result being that the entire suit stood dismissed. In the appeal before us the learned advocate who appears in support of it has frankly conceded that he cannot

press it on behalf of plaintiff 1. As regards the appeal of plaintiff 2, he challenges the entire proceedings on the ground that the certificate itself is not binding upon this plaintiff. The finding of the Court of appeal below regarding this question has to be stated. The learned District Judge found that the omission to describe this plaintiff as a minor was not deliberate and that it, therefore, could not be regarded as a fraud. On behalf of the respondent it has accordingly been contended that this appeal is barred by the provisions of Section 37, Public Demands Recovery Act, which is in these terms:

Except as otherwise expressly provided in this Act, every question arising between the certificate-holder and the certificate-debtor or their representatives, relating to the making, execution, discharge or satisfaction of a certificate duly filed under this Act, or relating to the confirmation or setting aside by an order under this Act of a sale held in execution of such certificate, shall be determined, not by suit, but by order of the certificate officer before whom such question arises, or of such other certificate officer as he may determine:

Provided that a suit may be brought in a civil Court in respect of any such question' upon the ground of fraud.

The argument is that the finding of the Court of appeal below being that there was no fraud and that finding not being now challenged, it is not open to the appellant to attack the sale upon any other ground. Such a contention has been sufficiently answered in *Tikendrajit Ghosh v. Jadav Mondal* : AIR1940 Cal554 and in *Harendra Kumar v. Secy. of State* : AIR1928 Cal808 . In the former case it was held that where the certificate-officer had no authority to hold the sale, and the sale was not a sale under the Act at all, the civil Court had jurisdiction to entertain a suit and grant relief, and that such jurisdiction was not ousted by Section 87, Public Demands Recovery Act. In the second case it was laid down that if at the time when the certificate was signed there was no public demand due from the certificate-debtor, the certificate was ultra vires and all proceedings founded thereon were null and void. It was further held that when the certificate itself is void, the right to seek relief in a Court of law is not taken away. It follows from the principle enunciated in these two decisions that, Section 37 of the Act

notwithstanding, it is always open to a party aggrieved by a certificate sale to seek relief by way of suit upon the ground that the certificate itself was not binding upon him.

3. As already stated, it was never disputed that plaintiff 2 was a minor at the time when the certificate was signed, that he was not represented by any guardian, and that in the certificate itself he was made to appear as a person who was sui juris. It is well settled that a minor is always entitled to treat as a nullity a decree pronounced against him, if he was not represented in the manner required by law in the proceedings which terminated in the decree. In *Mt. Rashidunnessa v. Mohamed Ismail Khan* ('09) 31 All. 572 a minor was not represented by a guardian ad litem in suits in which decrees were passed against her. She instituted a suit for a declaration that those decrees and certain sales held in execution thereof were not binding upon her. It being objected that under Section 244, Civil P.C., it was not open to her to raise such an objection in a suit, the Privy Council held that that section applied only to questions arising between the parties to the suit in which the decree was passed, and the minor was never a party in the proper sense of the term to the suits in which the decrees were made. Following this decision, it was held in *Puma Chandra v. Bijoy Chand* ('13) 18 I.C. 859 that a decree passed against a person who was really a minor but who was described in the suit as if he was of age, was a nullity so far as he was concerned. In *Champe v. Tarachand* ('24) 11 A.I.R. 1924 All. 892: 46 all the important earlier cases were reviewed, and it was held that when a person who was a minor throughout the entire course of the suit had not been represented by any guardian, the decrees passed against him were nullities and not binding upon him.

4. There can be little doubt that in so far as legal consequences are concerned, a certificate under the Public Demands Recovery Act stands upon the same footing as a decree of a civil Court, and it is not easy to understand how it can be said that in essential character the one is dissimilar to the other. We find it difficult to follow the reasoning of Henderson J. in *Jogesh Chandra v. Digendra Chandra* : AIR1939 Cal542 where a distinction has been drawn between a decree and a certificate on the ground that a decree cannot be made, as can a certificate, without service on the defendant and without some evidence. Undoubtedly, there is very great

dissimilarity between the procedure of a suit and that which leads up to the making of a certificate under the Public Demands Recovery Act. The procedure under the Act is of necessity of the most summary nature, but when that procedure terminates in a certificate, one has to look at the mandatory requirements of the law, and to see if these have been observed, for the purpose of ascertaining whether the certificate is valid and binding. If this is necessary in the case of a decree, it is equally necessary in the case of a certificate. One, therefore, has to ask whether the proper representation of a minor in the proceedings which terminated in the making of the certificate is a mandatory requirement of the law under the Public Demands Recovery Act in the same sense as the proper representation of a minor is a mandatory requirement under the Code of Civil Procedure. Order 32, Rule 3 (1) of the Code is in these terms:

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.

A similar rule is embodied in Section 41, Public Demands Recovery Act, which is as follows:

Where the certificate-officer is satisfied that the certificate-debtor is a minor or of unsound mind, he shall in any proceedings under this Act permit him to be represented by any suitable person.

It is to be noted that the word 'shall' in Order 32, Rule 3 (1) appears also in Section 41 of the Act, but whereas the first mentioned provision requires the Court to appoint a proper person to be the guardian of the minor, the latter provision provides that the certificate-officer is to permit the minor to be represented by a suitable person. In our judgment, the words permit him to be represented' do not make any difference to the mandatory character of Section 41. A civil Court under the Code has always the power to appoint a guardian ad litem of a minor who is a party to the suit. Under the general law a certificate-officer does not possess such a power, nor is it vested in him by the Act itself. When a certificate-officer is satisfied that a person is a minor, Section 41 of the Act requires that a guardian should be appointed, and it makes it incumbent upon the certificate-officer to see that the minor is thereafter represented by that guardian. In our judgment, the

principle stated in Order 32, Rule 3 (1) is the principle which is embodied in Section 41, Public Demands Recovery Act, and it follows that where the proceedings which led up to the making of a certificate and the certificate itself are defective by reason of the fact that a minor whose interests have been affected has not been properly represented by a guardian, it is open to the minor to challenge the validity of the certificate in so far as it affects him. A suit brought for such a purpose is not barred by the provisions of Section 37, Public Demands Recovery Act.

5. The appeal of appellant 2 who was plaintiff 2 in the suit is allowed with costs. The appeal of the other appellant is dismissed with costs. In the result, the decree of the lower appellate Court is set aside and that of the trial Court restored. The respondent will pay the costs of appellant 2 in this Court and also in the lower Courts. The other appellant, namely, appellant 1 will pay the costs of the respondent in all Courts.

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