

Sotish Chunder Lahiry Vs. Nil Comul Lahiry and ors.

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Court : Kolkata

Decided On : Sep-10-1884

Reported in : (1885)ILR11Cal45

Judge : Richard Garth, C.J. and ;Prinsep, J.

Appellant : Sotish Chunder Lahiry

Respondent : Nil Comul Lahiry and ors.

Judgement :

ORDER

Richard Garth, C.J. and Prinsep, J.

1. This was a rule obtained by Mr. Evans calling upon the claimant in the execution proceedings in this case to show cause why the order which had been made by the Deputy Commissioner, releasing certain property from attachment (which property is now supposed to belong to the claimant) should not be set aside, upon the ground that it was made with material irregularity.

2. The circumstances are these: The suit was brought, so far back as the year 1862, by the present plaintiff against the widow and the two minor sons of Shib Nath Lahiry for mesne profits, and that suit eventually came before the Privy Council, and the Privy Council made a decree in favour of the _____e plaintiff and sent the case back, in order that the amount of the wasilat should be ascertained.

3. Subsequently, in the year 1874, the widow professed to adopt, and is said to have adopted, the person whom I call the claimant. The ultimate decree that was obtained was obtained in the year 1880. Certain property was then attached as liable to satisfy the decree, and an application was afterwards made by the claimant to have the property released from attachment, upon the ground that he was in possession of it; or rather, that the widow was in possession of it for him, and that he was in point of fact, in possession of it and not the widow; and the Deputy Commissioner made an order that the property should be released from attachment.

4. This is the order against which this rule was obtained; it is said that the Judge acted with material irregularity in making that order.

5. We cannot see that he acted with any irregularity. He might have made a mistake in making such an order; but it was for him to determine whether the attachment should, or should not, be set aside, and under different circumstances the order which he made might have been a proper one. But he probably was not aware of the difficulty which often attends the solution of questions of this kind in point of law.

6. If the decree which was obtained was virtually a decree against the husband's property, it would bind that property, whether the person sued was the widow, or the adopted son.

7. It is not for us to determine here what was the legal effect of the decree; but so far as we can understand, the decree was in the first instance obtained against the widow as representing her husband's estate; and it also appears to have been obtained for a debt of the husband. Therefore, whether the widow now properly represents the estate, or the adopted son properly represents the estate, the estate would nevertheless be answerable for this debt, supposing the decree to have been properly obtained.

8. This case would seem to come within the principle of a case decided some years ago in this Court, and which was afterwards approved of by the Privy Council the case of *Ishan Chunder Hitter v. Baksh Ali Soudagur Marsh*. 614.

9. The circumstances of that case were these: A widow was there sued upon a bond, which had been given by her deceased husband, and at a time when she was not the heir of her husband; because the heir of the husband was her son, of whom she was only the guardian.

10. The suit, nevertheless, proceeded against the widow, and a decree was obtained against her; and under that decree the husband's property was sold.

11. The son then brought a suit to recover this property, upon the ground that at the time when the decree was obtained against the widow, and the property sold, she did not properly represent the estate; but it was held, that as in point of fact she was the registered owner of the property, and as the suit was brought against her in respect of her husband's debt, and as by the terms of the decree the estate was rendered liable for the debt, the sale under the decree against her bound the property, although her son was no party to the suit. The principle of that decision has been adhered to in several other cases, and has been confirmed by the Privy Council. In the case of the General Manager of Raj Durbhanga v. Maharajah Coomar Ramaput Singh 14 Moo. I.A. 605 the suit had been brought by A against B for arrears of rent, and (B having died pending the suit) a decree was obtained by A against B's widow, who had been made a defendant in his' stead. Under that decree an execution was issued and 'the interest of the widow' was sold under that decree. The widow in fact did not represent the estate of her husband, because there was a son who was the husband's heir. The sale was subsequently called in question by a creditor; and it was held by the Privy Council that, although the son was never made a party to the proceedings, and although the widow did not properly represent the estate, still as the decree was obtained against the estate the sale under the decree passed the husband's property. In that case their Lordships say: 'The whole proceeding, if fairly looked at, amounts to this--that the estate of Gourpershad (the father) was sold under that decree in execution for his debt, and that the interest of his widow, the registered proprietrix and ostensible owner of the estate, and also the interest of the son, if he had any interest, was bound by that decree. If that be so, the question arises, whether the respondent, the plaintiff in the suit below, has any ground upon which he can come in and impeach the sale. It appears to their Lordships, that he can claim only what

interest remained in Gourpershad, and that substantially the proceedings would be a bar to any claim on the part of Hurpershad.' And further on their Lordships say: 'Their Lordships also desire to add that they are unable to see any substantial distinction between this case and that of Ishan Chunder Witter v. Baksh Ali Soudagur Marsh 614. They entirely agree in the principles expressed by Chief Justice Peacocok in that case, and think that they govern the present case.'

12. There is also another authority in I.L.R. 7 Cal. 357, in which the cases on this subject are reviewed, and in which this same doctrine was acted upon.

13. Therefore, if, as would appear to be the fact, the decree in this case was a decree against the husband's estate, and it was obtained against the widow as representing the husband's estate, it seems, according to the principle of these cases, that it would bind that estate whether the widow or the adopted son was the proper representative.

14. Under these circumstances, apparently, this property was attached, and the adopted son comes in and makes an application to the Court to have the property released from attachment. Probably, if the Judge had been aware of the authorities that I have quoted, instead of making the order which he did, he would have suggested, what I am about to suggest now, that the adopted son should be made a party to the proceedings (which would be, of course, perfectly fair), but that the attachment should continue, unless the adopted son were able to show some good cause why the sale should not take place.

15. If the decree were against the estate, it would seem, so far as we can see, to matter very little whether the widow or the adopted son was the proper representative. But it is quite right that the adopted son should be made a party to the proceedings, in order that, if there was any good reason against the sale, he might be able to show it.

16. After the observations that we have made, the plaintiff will see that his proper course will be to make an application to the Court below, to have the adopted son made a party to the proceedings.

17. What we are asked to do now, is to set aside the order made by the Deputy Commissioner, releasing the property from attachment or to make the adopted son a party to the proceedings. We have no power to do either one or the other. We have no materials before us, which would justify us in setting aside the order; nor have we any power in this Court to order that the adopted son be made a party to the proceedings. That, of course, must be the subject of an application to the Court below.

18. If the adopted son is made a party to the proceedings, and another attachment is then issued, the order which has been made will be no bar to the execution.

19. We therefore think that the rule should be discharged, but, under the circumstances, we make no order as to costs.

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