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Court : Kolkata

Decided On : Feb-08-1915

Reported in : 29Ind.Cas.211

Judge : Sharfuddin and ;Coxe, JJ.

Appellant : Keshawe Surendra Sahi and ors.

Respondent : Rani Devendrabala Dasi

Judgement :

Sharfuddin, J.

1. In this appeal the appellant is a minor. He had, on the 10th July 1912, applied under Section 47 and Order XXI, Rule 90, of the Civil Procedure Code, to set aside the sale of his properties in execution of a decree on the ground of irregularities resulting in inadequacy of the price fetched at the sale. This petition was put in on his behalf by his mother as guardian and next friend of the minor.

2. The decree that brought about the sale was a mortgage-decree, the mortgagor being Baboo Shyam Surendra Sahi, the uncle of the minor. Shortly after the first execution petition the mortgagor died and thereafter on the 22nd March 1909, an application for substitution was made-by the decree-holder. The present appellant is the sole legatee of his uncle, the mortgagor, under a Will. The above application was that the name of the minor, along with that of his father, Hari Harendra Sahi,

and some others should be substituted. No application, however, was made under Order XXXII, Rule 3, for the appointment of a guardian ad litem of the minor. Nor does it appear that any such order was ever made under the above provisions. But on the above application by the decree-holder substitution was made, but the minor was not described in the amended execution petition as being under the guardianship of his father. The minor in this amended execution petition was simply named and described as a minor. It is admitted, however, that the father began to act as guardian of his minor son and he did act as such in the previous stages of the execution proceedings and the Court allowed him to act as such. The father, as already observed, was himself one of the substituted judgment-debtors. The father of the minor has another son by another wife and this son is married to the sister of the present Maharaj Kumar of Hutwa, and it is the Hatwa Raj which is the purchaser at the sale.

3. It appears that there were five execution proceedings. The last ended in the sale of the properties.

4. The sale was fixed for the 3rd June 1912 which was a public holiday, and the Court was closed on that day. On the 4th June, i.e., on the re-opening day, a petition was put in only on behalf of the father of the minor, under a vakalatnamah executed only on behalf of the father. In the body of the petition it is mentioned that by the arrangements suggested in the petition the minor would also be benefited. But it is clear that so far as this petition goes, the minor was not represented. By this petition the Court was informed that the Maharani of Hatwa was willing to purchase the properties at the sale on behalf of her ward, the Maharaj Kumar of Hatwa, and as for that end she had to move the High Court, the sale should be postponed for a week.

5. This petition also waived the right to demand a fresh proclamation by stating that the sale proclamation had been duly published and served. The sale was postponed and was fixed for, the 11th June. The sale proclamation had notified that 48 mahals had to be sold. In the ordinary course these mahals should have been put up one by one and not in one lot. On the 11th June, before the sale, an application was put in on behalf of the minor alone without stating who acted for

him as guardian. The scribe of this petition is one Sridhar Lal, who is an agent of the minor's father (Vide vakalatnamah, dated 1st June and filed on the 4th June). There is a little difference in the name. In the petition he signs as Sridhar Lal and in the vakalatnamah as Sridhar Prosad. We have been assured that it is one and the same man. It is a matter for inquiry. Let us now examine this petition of the 11th June, wherein the minor is not at all represented. Contrary to the notification in the proclamation of sale, the prayer in this petition is that all the mahals (48 in number) should be sold in one lot because there were big and monied men who wished to purchase the mahals. The Subordinate Judge accepted the prayer and all the 48 mahals were sold in one lot and purchased by the Hatwa Raj.

6. On the 10th July 1912 the mother of the minor, styling herself as the guardian and next friend of her minor son, applied under Section 47 and Order XXI, Rule 90, of the Code on various allegations of fraud and collusion, but the learned Subordinate Judge rejected that petition on the ground that so long as the minor's father, who had acted as guardian throughout the execution proceedings for four years, is not removed from his office, the mother had no locus standi to make the petition.

7. If the learned Subordinate Judge had only taken the trouble of reading the petitions of the 4th and the 11th June, he would have found that the minor was not at all represented in these petitions.

8. It is admitted that no application for the appointment of a guardian was ever made and no such order was ever passed. The father was never formerly appointed guardian, and I do not see how one could ask the Court to remove a man from guardianship who was never appointed by the Court. On the application of the decree-holder filed on the 22nd March 1909, it was the imperative duty of the Subordinate Judge, after making some inquiry, to appoint a proper person as a guardian of the minor to act for him in the execution proceedings. No such thing was done. A number of authorities have been placed before us by the respondents showing that when a person, although not formally appointed, has acted for the minor throughout a proceeding or a suit, the Court ought to hold that the minor was represented. But in the present proceedings the minor was not represented

by his father as already pointed out.

9. We hold that, in the circumstances stated above, the mother was entitled to make this application and that she should be appointed guardian ad litem of the minor. The sale of the property without appointing such a guardian is in itself an irregularity, which will vitiate the sale if it has caused injury to the minor. Accordingly we remand the case under Order XLI, Rule 23, for disposal on the merits. The Subordinate Judge must decide whether any irregularities, other than that mentioned above, have been proved, and whether, if so, the minor has been injured either by the irregularity to which we have referred or by those found by the Subordinate Judge. Costs will abide the result.

Coxe, J.

10. I agree.

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