

Ram Chandra Arya

Vs

Man Singh & Anr.

Civil Appeal No. 379 of 1965

(V. Ramaswami-I, J. C. Shah, V Bhargava JJ)

08.12.1967

JUDGMENT

BHARGAVA, J. –

This appeal arises out of a suit for possession of a house which, at one time, used to belong to one Ram Lal. On 11th January, 1939, one Ram Das filed suit No. 354 of 1939 against Ram Lal in the Court of Judge, Small Causes, for recovery of a sum of Rs. 144/-. That suit was later transferred to the Court of the Munsif and an ex parte decree in that suit was passed on 27th March, 1939, after the Court held that Ram Lal had been sufficiently served. In execution of that decree, the house was sold and the sale certificate was issued on 21st January, 1941 in favour of Prabhu Dayal, the father of the appellant in this appeal. Formal delivery of possession was taken and the certificate of delivery of sale is dated 15th May, 1941. Admittedly, Ram Lal continued to live in the house ever thereafter, and on 19th September, 1945, he died leaving no heir. Ram Lal was a subject of the Maharaja of Jaipur and, on Ram Lal's death, the servants of the Maharaja took possession of the house on 20th September, 1945.

Thereupon, suit No. 552 of 1946 was filed by Prabhu Dayal, the father of the appellant, for possession of the house on 10th July, 1946. The suit was contested on the ground that Ram Lal was a lunatic and the earlier suit No. 354 of 1939 had been instituted against Ram Lal without appointment of a guardian-ad-litem, so that the decree in the suit was a nullity. The sale in execution of that decree was also, therefore, challenged as void. This defence was accepted by the trial Court and the suit was dismissed on 24th January, 1950. The first appellate Court also upheld that decision. The second appeal came before a learned single Judge of the Allahabad High Court who referred it to a Division Bench as, in his opinion, the case involved an important question of law. The Bench of the High Court confirmed the decisions of the lower Courts and, consequently, the appellant has now come up to this Court by special leave.

As has been mentioned above, the suit was dismissed by the trial Court and that decision has been upheld by the first and the second appellate Courts on the ground that the decree against Ram Lal was a nullity and the sale held in execution of that decree was, therefore, void. It appears from the judgment of the High Court that, in that Court, no attempt was made on behalf of the appellant to contend that the decree which was obtained against Ram Lal and in execution of which the house was sold was not null and void and was not a nullity. On the face of it, the decree was passed in contravention of the provisions of O. 32 r. 15 of the Code of Civil Procedure. It had been found as a fact that Ram Lal was insane when suit No. 354 of 1939 was instituted as well as when the house was sold in execution of the decree passed in that suit. It is now a well-settled principle that, if a decree is passed against a minor without appointment of a guardian, the decree is a nullity and is

void and not merely voidable. This principle becomes applicable to the case of a lunatic in view of r. 15 of O. 32 of the Code of Civil Procedure, so that the decree obtained against Ram Lal was a decree which had to be treated as without jurisdiction and void. In these circumstances, the sale held in execution of that decree must also be held to be void.

Learned counsel appearing on behalf of the appellant contended that this proposition should not be accepted by us in view of the decision of this Court in *Janak Raj v. Gurdial Singh and Another* [[1967] 2 S.C.R. 77]. The decision of that case is, however, not applicable to the case before us at all. In that case, a stranger to the suit was the auction-purchaser of the judgment-debtor's immovable property in execution of an ex parte money decree. Before the sale could be affirmed, the ex parte decree was set aside and the question arose whether the auction-purchaser was entitled to a confirmation of the sale under O. 21, r. 92, C.P.C. The Court held that the sale should be confirmed. The law makes ample provision for the protection of the interests of the judgment-debtor, when his property is sold in execution. He can file an application for setting aside the sale under the provisions of O. 21, Rr. 89 and 90. C.P.C. If no such application was made, or when such an application was made and disallowed, the Court has no choice but to confirm the sale. This principle can be of no assistance to the appellant in the present case, because, in that case, when the sale was actually held, a valid ex parte decree did exist. The sale, having been held in execution of a valid existing decree, was itself valid; and the only question that came up for decision was whether such a valid sale could be set aside otherwise than by resort to the provisions of Rr. 89 and 90 of O. 21, C.P.C. In the present case, the decree, being a nullity, has to be treated as non-est and, consequently, the sale, when held, was void ab initio. In such a case, there is no question of any party having to resort to the provisions of Rr. 89 and 90 of O. 21, C.P.C. to have the sale set aside. Any claim based on a void sale can be resisted without having that sale set aside. The decision of this Court in that case itself brings out this distinction by stating :

"It is to be noted however that there may be cases in which, apart from, the provisions of Rr. 89 to 91, the court may refuse to confirm a sale, as, for instance, where a sale is held without giving notice to the judgment-debtor, or where the court is misled in fixing the reserve price or when there was no decree in existence at the time when the sale was held."

This Court, thus, in that case, clearly recognised that, if there be no decree in existence at the time when the sale is held, the sale can be ignored and need not be set aside under the provisions of Rr. 89 to 91, C.P.C. In the present case, as we have held, the decree passed against Ram Lal was void and has to be treated as non-existent and consequently, the sale must be held to be a nullity.

Learned counsel also referred us to the decision of the Privy Council in *Khjarajmal and Others v. Daim and Others* [32 I.A. 23], but even that case, in our opinion, does not help the appellant. In that case, the equity of redemption in respect of certain property was sold in execution of decrees without service of notice on some of the mortgagors. The Privy Council held :

"Their Lordships agree that the sales cannot be treated as void or now be avoided on the grounds of any mere irregularities of procedure in obtaining the decrees or in the execution of them. But, on the other hand, the Court had no jurisdiction to sell the property of persons who were not parties to the proceedings or properly represented on the record. As against such persons the decrees and sales purporting to be made would be a nullity and might be disregarded without any proceeding to set them aside."

Proceeding further and dealing with the case of one of the mortgagors, it was held that, because his interest in the property had been ignored altogether and there was no decree against him, the Court had no jurisdiction to sell his share. The portion of the judgment, on which learned counsel relied, related to the remarks made by the Privy Council when dealing with an earlier decision in *Malkarjun v. Narhari* [27 I.A. 216]. After discussion the ratio of that case, their Lordships at the end remarked :

"In coming to his conclusion, their Lordships are quite sensible of the importance of upholding the title of persons who buy under a judicial sale; but in the present case the real purchaser was the judgment creditor, who must be held to have had notice of all the facts."

On the basis of this comment, it was urged that their Lordships of the Privy Council intended to lay down that, if the auction-purchaser was not a judgment-creditor, the sale could not be a nullity. We are unable to read any such principle in that decision. In fact, the Privy Council, in very clear words, held that the sale was a nullity and only, at the end, took notice of the fact that, in that particular case before it, the real purchaser happened to be the judgment creditor, so that the interest of a stranger purchaser could not be defeated by him. We are not prepared to read in that judgment any decision that, if the auction-purchaser is not the judgment creditor but a stranger, the sale would be a valid sale, even though it was held in execution of a decree which was void. A sale is void ab initio if it is held in execution of a decree which is nullity and, consequently, to be treated as non-existent. In the present case, therefore, no rights could be acquired by the purchaser Prabhu Dayal, the father of the appellant, when he purported to purchase the house in execution of the decree against Ram Lal. Ram Lal having died without leaving any heir, the property naturally passed by escheat to the Maharaja of Jaipur. That principle is clearly recognised in Hindu law. Reference may be made to Mulla's Hindu Law, 13th Edition, p. 133, para. 59.

The decision given by the High Court, in these circumstances, was perfectly correct. The appeal is dismissed with costs.

Appeal dismissed.

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