

## PATNA HIGH COURT

Lalji Sah

Vs

Sat Narain Bhagat

A.F.O.D. No. 116 of 1957

(Kanhaiya Singh and Ramratna Singh, JJ.)

13.10.1961

### JUDGMENT

#### **Ramratna Singh, J.**

1. The suit, out of which this appeal arises, was instituted by the plaintiff respondent 1st party for a declaration that a decree in small cause court suit No.228 of 1938, obtained by defendant No.1, Ramswarath Thakur (defendant No.2 who is Chandradeo Sah, mentioned as a decree-holder in para graph 7 of the plaint seems to be a mistake) and the auction sale in execution case No.1774 of 1938 in execution of the decree and the consequent deli very of possession of the properties described in the schedules appended to the plaint are illegal and void and they may be set aside. There is also a prayer for a declaration that certain zarpeshgi bonds in favour of Lalji Sah, the defendant 2nd party, and Lauhar Singh, the defendant 4th party, are illegal and without legal necessities. The last prayer is for recovery of possession of the property described in schedule 2 to the plaint. The plaintiff, who calls himself as Satnarain Bhagat, son of Gopal Bhagat, instituted the suit on the 26th May 1952 as a minor through his next friend Sukhat Bhagat, his father's sister's husband. But during the pendency of the suit he filed a petition that he attained majority on the 17th August 1953 and the lower court accepted him as major with effect from that date. In order to appreciate the case of the parties, it is necessary to bear in mind the following genealogical table: It is admitted that Damri Mahto died leaving two sons, namely, Lila Mahto and Nankhu Mahto. Lila died leaving a son, Gopal Mahto in a state of jointness with Nanku, who then became the karta of the family; and both Nankhu and Gopal were recorded in the record of rights in respect of their family properties. Nanku had two sons and a daughter Musammat Chimni. The two sons, Durga and Kali, had each a daughter. Both the sons died during the life of Nanku, who also died subsequently in a state of jointness with Gopal. Nanku's daughter Chimni and the daughters of Nanku's sons are also dead. Musammat Dhanwa, defendant No.15 described as the defendant 6th party, is the widow of Gopal. Defendant No.18 is alleged to be the son of Chimni, but this fact is disputed by the contesting defendants 3, 17 and 18 who are the appellants in this Court. The learned advocates for the parties have agreed that it is not necessary to decide in the present case whether defendant No.16 is the son of Musammat Chimni or not.

2. The property described in schedule 1 to the plaint is the agricultural land measuring 6 bighas

13 kathas 8 dhurs and is the ancestral land of Gopal and Nanku. The property described in schedule 2 to the plaint is the interest of a usufructuary mortgagee in some areas of culturable lands acquired under usufructuary mortgage bonds dated the 17th October, 1921, the 11th July, 1924 and the 23rd June 1925, respectively for Rupees 200, Rs.220 and Rs.227 executed by certain persons in favour of Nanku when he was alive. The properties of both the schedules are situated in village Ranpur where Gopal and Nanku lived and these are the properties which were auction-sold in execution of the small cause court decree, which was a compromise decree. The auction purchaser obtained possession of the properties through court on the 3rd November 1939. As only the right title and interest of the judgment-debtor passed at the sale, the property described in schedule 1 to the plaint was subject to two zarpeshgi or usufructuary mortgage bonds. The first bond dated the 15th September 1937 was executed by Musammat Dhanwa for self and as mother guardian of her minor son named Satnarain in favour of Jhagru Sah (defendant No.4) who is a brother of Lalji Sah (defendant No.3) both being members of a joint family. The second mortgage bond was executed on the 6th June, 1941, by Musammat Dhanwa for self and as guardian of her minor son for Rs.900 in favour of Mahadeo Singh, deceased father of Lauhar Singh (defendant No.10) in order to satisfy the bond of 1937. Mahadeo Singh instituted a suit for redemption in 1942 against defendant No.4 who pleaded the auction sale in execution of the small cause court decree and ultimately Mahadeo Singh withdrew that suit on the 17th August, 1944. The auction purchaser, Chandradeo Sah, executed a sale deed dated the 25th May, 1944 in respect of his right title and interest in the properties in schedules 1 and 2 to the plaint for Rs.1500 in favour of defendants 17 and 18, who are sons of Jammuna Prasad, a brother of defendant No.3. Defendants 17 and 18 were added as parties to the suit by order No.77 dated the 28th February 1956 of the lower court.

3. Then the case of the plaintiff is that after the death of his father, Gopal he got possession Of the disputed property through his mother until he was dispossessed on the 15th Magh 1358 Fasli; the 7th February, 1951. Then on an inquiry he learnt about the zarpeshgi bonds dated the 15th September 1937 and the 6th June, 1941, the re demption suit of 1941, the small cause Court suit, the decree and the auction sale and delivery of pos session in pursuance of that decree. It is alleged that the mother of the plaintiff, Musammat Dhanwa, is a simpleton and Mahadeo Singh and Jhagru Sah got collusive zarpeshgi bonds executed by her without any consideration or legal necessity. It is then said that the plaintiff of the small cause court suit instituted that suit on the basis of a forged and fabricated handnote apparently executed by Nanku Mahto and Gopal Mahto and obtained a decree against the plaintiff on the basis of a fraudulent compromise petition after suppressing processes and without the appointment of a guardian-ad-litem to look after the minor's inter est. The decree-holder similarly suppressed the processes in the execution case, as a result of which the properties were sold at a very low price and the auction purchaser obtained delivery of possession surreptitiously, although the value of the properties sold was not less than Rs.7,000 on the 3rd April, 1939, the date of sale. It is further asserted that Muammat Dhanwa did not file any petition of compromise in the small cause court suit nor did she affix any signature or thumb mark thereto and she was grossly negligent as guardian of the minor in the suit as well as in the execution proceedings. Hence, the decree, the sale, the delivery of possession and the zarpeshgi bonds are said to be illegal and not binding on the plaintiff.

4. Four written statements were filed, one by defendant No.16, who claims to be the son of Musammat Chimni and the rest by defendants 3, 17 and 18, respectively. It is unnecessary to refer to the allegations contained in the written statement of defendant No.16, in view of the fact

that he did (not?) appear at the time of the hearing of the suit in the lower Court, nor has he appeared in this Court; and the learned advocates for both the parties have agreed that it is not necessary to record any decision about him in the present case. The defense in the other three written statements is the same, because defendants 3, 17 and 18 belong to the same joint family with defendant No.3 as karta. Their defence is that the plaintiff is not the son of Gopal Mahto and he is really Shiva Narain Bhagat, son of Nakchhed Bhagat of village Jagdishpur, who was married to the sister of Musammat Dhanwa, wife of Gopal and that Sukhat Bhagat, the next friend of the plaintiff is the husband of the sister of Nakchhed Bhagat The real Satnarain, who was the son of Gopal, is said to have died on the 1st July, 1950; and, there fore, the plaintiff has no title to the suit proper ties, nor was he ever in possession of the same. It is then asserted that Musammat Dhanwa executed the zarpeshgi bond dated the 15th Sept ember, 1939 for Rs.700 for self and as mother-guardian of the real Satnarain in favour of Jhagru Sah for consideration and legal necessities. The zarpeshgi bond dated the 6th June, 1941, in favour of Mahadeo Singh for Rs.900 is, however, said to be a farzi transaction and defendant Lauhar Singh (defendant No.10) and defendants 5 to 9, 11 to 14 and 16 are said to be in collusion with the plaintiff. The small cause court suit is said to have been instituted by defendant No.1 to recover some dues under a handnote executed by Gopal and Nanku, who could not pay the same in their life time. The processes in the suit as well as in the execution proceedings are said to have been properly served; and Musammat Dhanwa, as guardian of her son, properly entered into the compromise on the basis of which the decree was passed. It is denied that Musammat Dhanwa was grossly careless in looking after the interest of her minor son in the suit, or in the execution proceedings. Defendant No.2 purchased the suit property at the auction sale in good faith on the 3rd April, 1939 for a fair price in view of the previous en cumbrances and obtained actual delivery of possession through court on the 3rd November, 1939. Thereafter, defendant No.2 sold his entire interest in the suit properties to defendants 17 and 18 on the 26th May 1944, for Rs.1,500 out of which a sum of Rs.800 was paid in cash to the vendor in the presence of the sub-registrar and Rs.700 was adjusted towards the dues of the zaroeshgi bond dated the 15th September 1937; and since then the vendees, who purchased the properties in good Faith, are in possession of the same. The allegations that Musammat Dhanwa is a lady of weak intellect and she was in collusion with defendants 1 to 4 or careless and negligent in looking after the interest of her minor son, are all denied. The last plea is that the suit is barred by limitation.

5. The learned Subordinate Judge found that the plaintiff is the real Satnarain, son of Gopal, and the zarpeshgi bond dated the 15th September, 1937, for Rs.700 in favour of defendant Jhagrusah was without consideration and not for legal necessity. He further found that the small cause court decree, the auction sale and the delivery of possession through Court were all collusive and fraudulent and, therefore, not binding on the plain tiff. The plea of limitation was also rejected; and the suit was decreed in full with costs. Hence, the appeal by defendants 3, 17 and 18.

6. The first attack of Mr. Kailash Roy, counsel for the appellants was, against the finding of the Subordinate Judge that the plaintiff is the real Satnarain, son of Gopal. But as the suit fails on other grounds, it is not necessary to decide this fact; and I shall assume for this case that the plain tiff is son of Gopal.

7. The principal question that falls to be determined is whether the compromise decree and the execution sale are liable to be set aside. The plaintiff-respondent attacked the decree on the sole ground of non-compliance with the provisions of Order 32, Rule 7 of the Code of Civil

Procedure. The appellants urged that the plea was not available in as much it was not specifically pleaded. I think there is considerable force in this contention. It is a well settled principle that in case of fraud, undue influence and coercion, the party pleading it must set forth in the pleadings the full particulars thereof and there can be no departure from them subsequently (see *Bishundeo Narain v. Seogeni Rai*<sup>1</sup>). The plaint shows that the decree was assailed on the grounds that the suit was based on a forged handnote, that the processes were suppressed, that no proper guardian was appointed for the minor Satnarain that the guardian was grossly negligent and that a decree was obtained on the basis of a fraudulent compromise petition. At the time of hearing all these grounds were given up and the contention before the Court below was that the decree was vitiated in as much as the mandatory provisions of Order 32, Rule 7 were not observed. The contesting defendants objected to the entertainment of this contention at the time of argument; but the Court allowed it to be raised and also upheld it, because it was implied in the plea that the decree was fraudulently obtained and that the minor was (not?) properly represented on account of gross negligence. The said plea is contained in paragraph 7 of the plaint, which is reproduced below;

'That the plaintiff has further come to know on enquiry that defendant No.2 instituted small cause Court suit No.228/121 of 1938 against the plaintiff in the Court of the Munsif at Gopalganj on the basis of a forged and fraudulent handnote apparently executed by Nanhku Mahto and Gopal Mahto and got the summons and notice in the said suit fraudulently and surreptitiously served and obtained a decree against the plaintiff on a fraudulent compromise petition; and no proper guardian of the plaintiff was appointed in the aforesaid suit and the plaintiff was not properly represented, nor did any guardian do proper pairvi, rather gross negligence was also disclosed. Gopal and Nanhku Mahto did not at all take loan from defendant No.2, nor did they execute hand-note.'

It is obvious, on a plain reading of this paragraph, that the legality of the decree was not questioned for want of leave of the Court.

8. I think the Court below was not right. This is a mixed question of fact and law and can not be decided on the abstract principle of law, unless the facts are investigated and determined. Hence, it was incumbent on the plaintiff to plead it specifically. It cannot be spelt out from the general allegations made in the plaint. It is apparent that other facts concerning the validity of the decree are in fact averred in the plaint and there is no reason why this plea was not specifically raised. It will be hard and also unjust, to assume that the contesting defendants must have divined it and adduced evidence and contradicted it. This fact is not ancillary or collateral to the facts alleged, so that it could be inferentially assumed. I must, therefore, hold that the plea was not available. I do not, however, mean to suggest that a question of law cannot be entertained at the time of argument or in appeal. It can be taken, provided it is based on facts, admitted or proved. Where the determination of legal objection necessitates fresh investigation of facts, it cannot be entertained.

9. Assuming that the plaintiff was entitled in law to raise the plea in this case, there is absolutely no evidence to substantiate it.

10. Order 32 rule 7 of the Code of Civil Procedure provides that any agreement or compromise by a next friend or guardian of a minor in a suit entered into without leave of the court shall be voidable against all parties other than the minor and leave of the court, if any, shall be expressly recorded in the proceedings of the suit. The compromise decree or the ordersheet of the suit has not been filed. There is no other evidence to show that Musammat Dhanwa does not speak a word about it. It is urged that the relevant record has been destroyed under the rules. It may be so, but in the absence of the relevant records, there must be some evidence; there is none. There is no factual foundation for the argument. The appellants have filed the petition of compromise dated the 6th April 1936 (Ex. F); but it is of no use on this point. There is, therefore, nothing on the records of the present suit to show whether leave of the court was obtained for entering into a compromise on behalf of the minor Satnarain in the small cause court suit.

11. The learned advocate for the plaintiff-respondent contended that the onus to prove that such leave was obtained and was granted and expressly recorded is on the appellants, while the learned advocate for the appellants said that the onus was on the plaintiff to prove the contrary.

12. In this connection sections 102 and 114 of the Indian Evidence Act may be seen. Illustration (e) to section 114 lays down that 'the court may presume that judicial and official acts have been regularly performed.' It was, therefore, observed by a Divisional Bench of this Court in *Thakur Prasad v. Raghubar Prasad*<sup>2</sup>,

'Under the law, when a minor is concerned as a party to a proceeding in court and compromise is proposed it is the duty of the court to look after the minor's interest. The court, therefore, prescribes that the guardian-ad-litem of a minor must obtain the permission of the court before entering into the compromise. Where the question of the regularity of the compromise arises subsequently, the presumption under section 114, Evidence Act, is that the court performed its duty, the onus of proof falls on the party which asserts that permission was not given by the court'.

With these observations, I respectfully agree. Under section 102 of the Evidence Act, the burden of proof lies on the person who would fail, if no evidence at all were given on either side. As has been laid down in *State of Bihar v. Shiva Bhikshuk Mista*<sup>3</sup>, a party, who alleges that a statutory provision was not followed, has to show by proper evidence that the requisite legal procedure was not followed. I am, therefore, of the opinion that the plaintiff-respondent had to prove in the present case that leave of the court was not obtained for entering into a compromise on behalf of the minor Satnarain in the small cause court suit; and that he has failed to do.

13. On behalf of the plaintiff-respondent reliance was placed on three decisions. In the case of *Rangulam Sahu v. Durga Pershad*<sup>4</sup>, a Division Bench of this Court held that it cannot be inferred that the court has, under Order 32, Rule 7 of the Civil Procedure Code, sanctioned a compromise from the mere fact that the petition of compromise gave notice to the court that interest of minor parties was intended to be affected by the compromise and that the court passed the decree in accordance with the compromise. But it was admitted in that case that no petition had been filed asking leave of the court to compromise the case on behalf of the minors. In *Ganesh Row v. Tuljaram Row*<sup>5</sup>, the Privy Council decided that the father of a minor could not without leave of the court enter into any agreement or compromise on behalf of the minor. But in that case also it

was admitted that no leave of the Court was sought or obtained. In *Manohar Lal v. Jadu Nath Singh*<sup>6</sup>, it was argued that inasmuch as the minor who was a party to the compromise was described in the title of the suit suing under the guardianship of his mother and the terms of the compromise were before the Court, the exigencies of section 462 (now Order 32, Rule 7) of the Code of Civil Procedure had been complied, with. But, Lord Maonaghten observed that this was

"not sufficient. There ought to be evidence that the attention of the Court was directly called to the fact that a minor was a party to the compromise and it ought to be shown, by an order on a petition, or in some way not open to doubt, that the leave of the Court was obtained".

It appears from the observation at the first sight that the onus to prove that leave of the Court was obtained lies on the party relying on the compromise decree. But it is evident from the argument of Mr. W.C. Bannerjee, summarised in the report, that it was admitted in the case that 'no formal order of leave was drawn up'; and the observation of Lord Macnaghten must be read in that light. Thus none of these decisions help the plaintiff-respondent.

14. The next contention of Mr. Thakur Prasad, learned advocate for the plaintiff-respondent, is that Musammat Dhanwa, another-guardian of Satnarain, was an illiterate rustic woman - and, there fore, she was grossly negligent in looking after the interest of the minor and fraud was practised upon her by the appellant Lalji Sah and his creatures. (His Lordship examined this contention and proceeded.) Thus, the plaintiff has failed to prove fraud or collusion with regard to the small cause court decree on the part of the guardian ad litem, Musammat Dhanwa. The learned advocate for the plaintiff-respondent, however, contended that, even in the absence of fraud or collusion on her part, the plaintiff can avoid the decree on the ground of gross negligence on the part of the guardian. There can be no dispute about this principle (See. *Kamakshya Narain Singh v. Baldeo Sahai*<sup>7</sup>,.) But, as pointed out by Meredith J., the expression 'gross negligence' is a bit vague and, as observed by Trevelyan on the Law relating to Minors, 5th Edn. page 284:

"It is not every kind of negligence or any amount of negligence which would render proceeding otherwise regular and proper liable to be opened up. It must be such negligence as leads to the loss of a suit, which, if it had been conducted with due care, must have been successful."

The facts and circumstances discussed above do not, however, justify the inference that the present plaintiff could have succeeded in the small cause court suit in depriving Ram Swarath Thakur of a decree in satisfaction of his claim based on the handnote executed by Nanku and Gopal. In view of the foregoing discussions, I am of the opinion that the minor Satnarain was properly re presented in the suit by the mother guardian, Musammat Dhanwa, that she was not negligent in looking after the minor's interest, and that there was no fraud or collusion in obtaining the com promise decree. Hence the decree was quite valid and legal.

15. The next contention of Mr. Thakur Prasad was that the execution sale was illegal and as such as (sic) the procedure were suppressed, no guardian was appointed for the minor and there was

gross negligence on the part of Musammat Dhan wa in looking after the interest of the minor. The learned Subordinate Judge did not consider these allegations in his judgment, because he found that the decree in the Small Cause Court suit was a nullity on account of the non-compliance with the provisions of Order 32, Rule 7, Civil Procedure Code, and therefore, he further found that the sale and the delivery of possession in the execution (sic) that a decree on the basis of an agreement or compromise entered into without leave of the Court shall be voidable, and not void against all parties other than the minor (See *Kaushalya Devi v. Baijnath Sayal*<sup>8</sup>). In view, however, of my finding that the decree was a good decree, a suit to set aside the sale is barred under Order 21, Rule 92 (3) of the Civil Pro. Code, unless the plaintiff proves lack of jurisdiction to hold the sale; and the plaintiff has failed to prove the same. Apart from this, even on merits there is no substance in this contention of Mr. Prasad. (His Lordship discussed the evidence and continued.) There is, therefore, no evidence on behalf of the plaintiff to show that the processes in the execution proceedings were not properly served or that they were suppressed; and it must be held, in the circumstances that there was no fraud or irregularity in the service of the processes.

16. Mr. Thakur Prasad then contended that Musammat Dhanwa was grossly negligent in the execution proceeding inasmuch as she did not raise any objection under sections 13 and 15 of the Bihar Money-lenders (Regulations of Transactions) Act, 1930, regarding the value of the judgment-debtor's property or the exemption of certain areas from sale in the case of an agricultural debtor. This plea is also not available to the plaintiff-respondent as it is not specifically pleaded. But even on

merits, this plea must fail. This Act came into force for the first time on the 15th April, 1939, and the sale had been held on the 3rd April, 1939. It is true that there were similar provisions in the Bihar Money-lenders' Act, 1938, which was repealed by the Act of 1939; but the Act of 1939 (1938?) had been declared ultra vires on the 30th November, 1938 by a decision of this Court in *Sadanand Jha v. Aman Khan*<sup>9</sup>, and that is why this Act had to be repealed by the Act of 1939. It appears from order sheet, Exhibit U, that even the notice under Order 21, Rule 22, was issued in the execution case on the 7th December, 1938, and, therefore Musammat Dhanwa could not legitimately raise any such objection under any of the two Acts.

17. Then remains one more point to be considered in respect of the execution proceedings As stated earlier, the properties were sold for Rs.275/- only, though the area of the kast land of the plaintiff was 6 bighas 13 Kathas and odd with a yearly rent of Rs.30/3/- and the interest of the plaintiff as mortgagee in the other proper ties sold was alone worth Rs.647. In the sale proclamation the mortgagee's interest was valued at Rs.60/- though the mortgage amounts mentioned therein come to Rs.517/- and the kast area of 6 bighas 13 kathas and odd plus a few kathas more, to talling 7 bighas 4 khatas and odd with a rental of Rs.300/3/- was not valued at all. It is true that the kasht land was subject to previous mortgages, but the mortgagee's interest alone was worth Rs. 647. Apparently, therefore, the properties were sold for a grossly inadequate price and this must be ascribed to the gross negligence on the part of the guardian Musammat Dhanwa. This fact, however, cannot affect the auction purchaser, Chandradeo Sah (defendant No.2) unless he was a creature of the decree-holder Ramswarath Thakur. There are a large number of authorities in support of this view.

18. In *Zain-ul-abdin Khan v. Mohammad Asghar Ali Khan*<sup>10</sup>, their Lordships of the Judicial

Committee said:- A sale, having duly taken place in execution of a decree in force at the time, cannot afterwards be set aside as against a *bona fide* purchaser, not a party to the decree, on the ground that, on further proceedings, the decree has been subsequently to the sale, reversed by an appellate Court.' In that case, a suit was brought by a judgment-debtor to set aside sale of his property in execution of the decree against him in force at the time of the sales but afterwards so modified, as the result of an appeal to Her Majesty in Council, that, as it finally stood, it would have been satisfied without the sales in question having taken place. He sued both those who were purchasers at some of the sales, being also holders of the decree to satisfy which the sales took place, and those who were *bona fide* purchasers at other sales under the same decree, who were no parties to it. On these facts, it was held:-

'As against the latter purchasers whose position was different from that of the decree-holding purchasers, the suit must be dismissed'.

In *Gopi Lal v. Jamuna Prasad*<sup>11</sup>, which was a case under section 144 Civil Procedure Code a Division Bench of this Court observed:

"The doctrine of restitution is based on the equitable principle that, on the reversal or modification of the previous order, the party affected should as far as possible be placed in the same position which he would have occupied but for such a decree, because it is the duty of the Court to act rightly and fairly according to the circumstances towards all the parties involved. But this principle cannot be applied in a case where it conflicts with another rule of equity, namely, that a 'bona fide' purchaser for value should not be allowed to suffer on account of the mistakes or irregularities committed in a Court of law."

In *Mani Lal v. Ganga Prasad*<sup>12</sup>, which was also a case under section 144, Civil Procedure Code, it was held by their Lordships of the Allahabad Court thus:-

"Where during the pendency of an appeal by the judgment-debtor, his property is sold in execution of the decree appealed against and is purchased *bona fide* by a stranger, the sale in his favour cannot be set aside, even though the decree is subsequently set aside in appeal, and the mere fact that the auction purchaser knew that the judgment-debtor had filed an appeal against the decree would not affect the *bona fide* nature of his purchase."

In *Krishna Chandra Mandal v. Jogendra Narain Roy*<sup>13</sup>, it was held, as per *pleciturum*, thus:-

'A stranger purchaser of property in execution of a decree is not affected by the subsequent cancellation of the sale on reversal of the decree, as he cannot be expected to go behind the judgment to enquire into irregularities in the suit; it is sufficient for him to know that the Court had jurisdiction and exercised it and that the order on the faith of which he purchased, was made and did authorise the sale. But this does not apply when the purchaser is himself a party and has notice, or at least opportunity of knowledge, of all

the proceedings therein, on the principle of *cessante ratione legis, cessat et ipsa lex*. When the reason of any particular law ceases, so does the law itself.'

The principle underlying these decisions is that a stranger auction purchaser for value should not suffer on account of the emissions and commissions of the decree-holders. It is, therefore, to be seen whether Ramswarath Thakur was, in any way, connected with the auction purchaser. There is no evidence to show that the decree-holder, Ramswarath Thakur and the auction purchaser, Chandradeo Sah (defendant No. 2) were connected with each other in any manner. The plaintiff (P.W.7) has stated that Lalji's sister is married to Chandradeo; but Lalji (D.W.23) has denied this fact. There is no other evidence to support the plaintiff's statement. As already stated, Ramswarath Thakur has denied the suggestion that he is in any way connected with Lalji. Thus, it must be held that Chandradeo Sah purchased the property at the auction sale in 1939 for himself and not in collusion with Ramswarath Thakur or Lalji Sah. He was, therefore, a *bona fide* purchaser for value; and the material irregularity or fraud on the part of the decree-holder in grossly under-valuing the mortgagee's interest in some of the properties and not at all valuing the kast land of 6 bighas and odd could not affect the interest of this purchaser.

19. The appellants purchased the suit properties from Chandradeo Sah under the sale-deed, dated the 25th May, 1944, (Ext. C) for Rs.1,500/-out of which a sum of Rs.800/- was paid in cash and the balance of Rs.700/- was set off towards the dues under the Zerpeshgi bond (Ext. N-3) dated the 15th September, 1937, executed by Dhan was in favour of Jhagru Sah brother of Lalji. As the sale in favour of Chandradeo Sah cannot be questioned in view of the above finding, this sale in favour of the appellants cannot also be questioned. The fact that the appellants got possession of the suit properties after their purchase is supported by oral evidence of several witnesses as well as circumstantial evidence. It has already been found that the auction purchaser got possession after Dakhaldehani. Mahadeo Singh had to withdraw his suit for redemption on contest by the appellants. Similarly, proceedings under sections 144 and 145 of the Criminal Procedure Code between the appellants and defendants No.5 and Jaisri Sah, father of defendants 6 to 9 ended in favour of the appellants. It must, therefore, be held that the appellants are in possession on the basis of their sale-deed.

20. Mr. Thakur Prasad contended that the zerpeshgi bond (Ext. N-3) was not for legal necessity. From the recitals of the bond, it appears that out of the sum of Rs.700/-, the consideration money of the bond, a sum of Rs.100 was to be paid towards the zerpeshgi bond executed by Gopal in favour of Dukhharan Sah and Jaisri Sah of Rampur, a sum of Rs.375 was to be paid towards the satisfaction of the dues under the hand notes executed by Dhanwa in favour of Yusuf Mohammad Mian and Bhagwan Prasad, respectively, a sum of Rs.125/- was due from Dhanwa to Jhagru Sah and a sum of Rs.100/- was taken by her in cash for payment of petty debts and for maintenance of the minor, Satnarain. So far as the dues of the bond executed by Gopal is concerned, the minor son was certainly liable to pay; but regarding the other amounts mentioned in the bond there is practically no evidence to prove legal necessity of the same. This fact does not, however, matter, because the zerpeshgi bond of Rs.1937/- is no more in existence and the appellants are in possession of the suit properties by virtue of the sale-deed taken by them from Chandradeo Sah, the auction-purchaser.

21. The plaintiff has also prayed for a declaration that the zerpeshgi bond executed by Musammatt Dhanwa in favour of Mahadeo Singh in 1941 for Rs. 900 is not binding on him as the same was not for legal necessity. Defendant Lauhar Singh, son of Mahadeo Singh, deceased, has not come to challenge this part of the case of the plaintiff; and the contesting defendants-appellants also say that this bond was without any consideration or legal necessity. In fact, this bond was executed in favor of Mahadeo Singh in order to satisfy the dues of the zerpeshgi bond of 1937 executed in favour of Jhagru Sah and the latter bond has not been redeemed as yet. Hence, the bond in favor of Mahadeo Singh is not binding on the plaintiff. But this finding does not help the plaintiff in respect of the suit properties, in view of the earlier finding that the auction sale in favor of Chandradeo Sah was valid and binding On Satnarain and consequently the appellants acquired good title under the sale deed executed in their favor of Chandradeo Sah.

22. The only point now to be considered is the plea of limitation raised faintly by Mr. Kailash Roy. He has argued that the suit was barred by limitation, because it was instituted by the next friend of the minor long after the date of confirmation of the auction sale, though the suit ought to have been brought within one year from that date or in case fraud was proved, within three years from the date when the fraud became known to the plaintiffs' guardian. Mr. Roy conceded that the minor could institute the suit within one year or, as the case may be, three years of his attaining majority. He however, attempted to make a distinction and said that this rule cannot apply to a case where the guardian of a minor institutes a suit during his minority. But there is nothing in section 6 of the Limitation Act to justify this distinction or to curtail the protection given to a minor by the acts of his guardian in the matter of instituting a suit or making an application. This section provides that the period of limitation prescribed for a person who does not suffer from any legal disability shall be computed in the case of a minor, from the date of cessation of his minority : see *Batuk Prasad v. Rudra Das*<sup>14</sup>, It is also well settled that the privilege given, to a minor under this section is not one that could be availed of by him only, but while the minor's disability lasts his guardian or next friend also can bring a suit or make an application though the ordinary period of limitation for such a suit or application has run out (see *Phoolbas Koonwar v. Lala Jogeshwar Sahay*<sup>15</sup>, *Khodabux v. Budree Narain Singh*<sup>16</sup>, *Jagadindra Nath Roy v. Hementa Kumari Devi*<sup>17</sup>, and *Satyendra Narain Siriha v. Pitamber Singh*<sup>18</sup>). Hence the plea of limitation fails.

23. My findings, therefore, are :-

- (1) The compromise decree in the small cause court suit in favour of Ramswarath Thakur was quite valid and legal;
- (2) the execution sale in favour of Chandradeo Sah was valid and binding on Satnarain son of Gopal;
- (3) the appellants, who had no concern with the small cause court suit or the execution proceedings, acquired good title to the suit properties on the basis of the sale deed dated the 25th May, 1944; and
- (4) the plaintiff is not entitled to recover possession of the properties in suit.

24. In view of these findings, the suit must be dismissed and the appeal is allowed with costs of both the Courts.

**Kanhaiya Singh, J.**

25. I agree.

Appeal allowed.

<sup>1</sup> AIR 1951 SC 280

<sup>2</sup> AIR 1952 Pat 469

<sup>3</sup> AIR 1960 Pat 162

<sup>4</sup> Pat LJ 190

<sup>5</sup> 40 Ind App 132 (PC)

<sup>6</sup> 33 Ind App 128 (PC)

<sup>7</sup> AIR 1950 Pat 97

<sup>8</sup> AIR 1961 SC 790

<sup>9</sup> AIR 1939 Pat 55 (FB)

<sup>10</sup> ILR 10 All 166 (PC)

<sup>11</sup> AIR 1954 Pat 36

<sup>12</sup> AIR 1951 All 832

<sup>13</sup> AIR 1915 Cal 203

<sup>14</sup> AIR 1950 Pat 206

<sup>15</sup> ILR 1 Cal 226 (PC)

<sup>16</sup> ILR 7 Cal 137

<sup>17</sup> ILR 32 Cal 129 (P.C)

<sup>18</sup> AIR 1938 Pat 92