

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Mussammat Bibi Walian and Others v. Banke Behari Pershad Singh and Others, from the High Court of Judicature at Fort William in Bengal ; delivered the 19th June 1903.

Present at the Hearing :

LORD MACNAGHTEN.

LORD LINDLEY.

SIR ANDREW SCOBLE.

SIR ARTHUR WILSON.

[*Delivered by Sir Arthur Wilson.*]

Tiluckdhari Singh on the 28th August 1873 executed a mortgage bond in favour of Chowdhry Sheik Wahid Ali to secure a sum of money borrowed from the latter, with interest.

In 1881 Zahurul Huck, the son of Wahid Ali, brought a suit to recover the money due under the mortgage bond, and Tiluckdhari being then dead, he made Defendants Gajadhur, the adult son of Tiluckdhari by one marriage, and Moti Rani Koer, as mother and guardian of four minor sons by another marriage.

On the 29th October 1881 the Plaintiff in that suit obtained an *ex parte* decree in his favour, under which the mortgaged property was put up for sale and ultimately purchased by the decreeholder, who was put into possession by the Court on the 8th January 1883.

The present suit was brought in the Court of the Third Subordinate Judge of Patna, the plaint having been ultimately filed on the 5th

January 1895. The Plaintiffs are the younger three of the sons of Tiluckdhari, described as minors in the former suit. The substantial Defendants are the representatives of the Plaintiff in that suit; the fourth and fifth Defendants are Gajadhur, the half-brother of the Plaintiffs, who was the adult Defendant, and Sidheswar, the elder uterine brother of the Plaintiffs, who was one of the minor Defendants in the former suit. Of these two it is said in the plaint that, as they are acting in concert with the other Defendants, they are made *pro formâ* Defendants.

The material allegations in the plaint were to the following effect:—That Tiluckdhari borrowed the money raised under the mortgage bond of the 28th August 1873 for immoral purposes, so that his sons were not answerable for the debt; that the former suit, that to enforce the bond, was fraudulently brought and carried through by the then Plaintiff in collusion with the Plaintiffs' half-brother Gajadhur, the adult Defendant in that suit and the fourth Defendant in this suit, and that the proceedings in execution and the sale were equally fraudulent. It was further alleged that no summons or other process was served in the suit or execution proceedings upon the present Plaintiffs, and that no guardian in the suit was duly appointed for them. On these grounds it was prayed, amongst other things, that it might be held that the auction sale, so far as the Plaintiffs' share was concerned, was held in an illegal way, and that Zahurul Huck and the Defendants as his heirs acquired no right to the property in dispute; that the auction sale and the decree might be declared inoperative against the Plaintiffs; and that the latter might be put in possession of the share claimed by them.

The substantial Defendants in their written statements denied all the allegations of the plaint. On these pleadings issues were raised, of which it is only necessary to notice the fifth, sixth, seventh, and eighth. The fifth asked, amongst other things, whether the money under the original bond was raised for illegal and immoral purposes. The sixth was whether the sale was liable to be set aside and the Plaintiffs restored to possession. The seventh was whether the Plaintiffs were properly represented in the suit and execution proceedings, and, if not, whether they were void on that ground. The eighth was whether the suit and proceedings in execution were tainted by fraud as alleged, and, if so, whether they were void on that ground.

It is clear, therefore, that the substantial case of the Plaintiffs was a case of fraud; the seventh issue, however, raised a question of a totally different kind, whether the suit and execution were void by reason of defects in procedure.

At the trial before the Subordinate Judge the Plaintiffs' main case failed altogether. The Court found that Tiluckdnari's bond was not given for immoral or illegal purposes, so that the debt was binding upon his sons, and that there was no fraud. And those findings have not been impeached.

As to the case based upon defects of procedure in the former suit, the Subordinate Judge held, first, that the then minor Defendants (including the present Plaintiffs) were parties Defendant to the suit; and the High Court accepted this view, in which their Lordships entirely concur.

The alleged defects which remain are, first, that the present Plaintiffs were not properly represented in that suit; that they were not properly served with summons in the suit; and that they were not properly served in the execution proceedings.

As to the first of these points, the mother of the present Plaintiffs appears throughout the proceedings in the former suit as their guardian. It is impossible at this distance of time to ascertain positively whether an order appointing her guardian *ad litem* was ever drawn up; but the Subordinate Judge in the present case assumed that there had been none, and he was probably right. An examination, however, of such proceedings in that suit as are forthcoming shows that the Court admitted the plaintiff in which the mother was described as guardian; that in its decree it so described her; and that similar language was used in the execution proceedings. In this connection it is necessary to notice that on the 26th November 1881 Durga Dutt, the uncle of the present Plaintiffs, obtained an order for a certificate of guardianship to them, but the certificate was not taken out till the 29th July 1882, long after the decree and the order for sale in execution, and a few days before the actual sale.

As to the alleged defect of service of summons in the former suit, the decree in that suit recites that "by the evidence of the peon who served the summons, and that of the identifier, the service on them" (the Defendants in that suit, including the Plaintiffs in this) "is proved." The evidence of the peon is not available by reason of the lapse of time, but a deposition of the identifier is in evidence:—"I did not go with the Court's peon to the residence. I identified Gajadhur Singh here in this Court. . . . He took all the summonses and duplicates of the plaint addressed to the Defendants, and granted a receipt on behalf of all the four by his own pen. Gajadhur was the guardian of all the three Defendants, and he is agent as well." The Subordinate Judge has found that Gajadhur was at that time joint with his minor half-brothers, and there is evidence that he acted as

karta of the family, as he naturally would under the circumstances.

The Subordinate Judge held that, though no formal order appointing the mother to be guardian *ad litem* of the infants had been drawn up, the Court must be deemed to have sanctioned the appointment, and that the want of a formal order was at most an irregularity, which could not invalidate the proceedings in the absence of proof of prejudice having accrued to the present Plaintiffs, while as to the certificate to Durga Dutt, he held that the date of its issue made it immaterial. As to the service of summons in the suit, and of processes in the execution proceedings, the Subordinate Judge arrived at a similar conclusion, and he dismissed the suit.

On appeal to the High Court, that Court conceded that the suit was substantially against the minors; but with reference to the representation of the minors, it was said: "It is necessary that the Court should see that a proper guardian be appointed to protect their interests. Section 443 of the Code of Civil Procedure is imperative upon this point; the Court, after satisfying itself of the fact of minority, is bound to appoint a proper person to act on behalf of the minor in the conduct of the case." In this statement of the law their Lordships entirely concur, and they desire to impress upon all the Courts in India the importance of following strictly the rules laid down in the section referred to. But it is quite another thing to say that a defect in following those rules is necessarily fatal to the proceedings. The High Court, however, considered that there was nothing from which they could presume, as the Lower Court had done, that the Court in the mortgage suit had sanctioned, expressly or impliedly, the appointment of the minors' mother as their guardian *ad litem*; and the

learned Judges thought the defect was emphasised in the execution proceedings by the fact of Durga Dutt having obtained the certificate already referred to. They also considered that there had been no sufficient service of summons in the former suit. On these grounds they reversed the decision of the first Court and made a Decree in the Plaintiffs' favour. Against that Decree the present Appeal has been brought.

Their Lordships are unable to concur in the conclusion at which the learned Judges arrived. The present Plaintiffs were substantially sued in the former suit, and the alleged fraud has been negatived. It appears to their Lordships that they were effectively represented in that suit by their mother, and with the sanction of the Court; and for the reasons given by the first Court their Lordships attach no importance to the certificate of Durga Dutt. There is nothing to suggest that their interests were not duly protected. The only defects which can be pointed out are that no formal order appointing the mother of the now Plaintiffs to be their guardian *ad litem* is shown to have been drawn up; and that it is not definitely shown that any attempt was made to serve the summons in the former suit upon the infants personally, or upon their mother, a purdah-nashin lady, before serving it upon Gajadhr, the only adult male member and the karta of the family. It has not been shown that the alleged irregularities caused any prejudice to the present Plaintiffs; nor indeed could there well be any, since it has been found that the original debt was one for which the present Plaintiffs were liable.

Their Lordships are of opinion that the defects of procedure alleged in this case are at most irregularities which, under Section 578 of the Civil Procedure Code, would not have furnished ground for reversing the proceedings in the

former suit, if they had been raised upon Appeal in that suit. This is in accordance with the ruling of a Full Bench of the Calcutta High Court in *Suresh Chunder Wum Chowdhry v. Jugut Chunder Deb* (I.L.R. 14 Calc. 204), approved by this Board in *Hari Saran Moitra v. Bhubaneswari Debi* (15 I.A. 195, at p. 200), and with the decision in the last-mentioned case. And the Plaintiffs who have brought a separate suit to set aside the Judgment and execution proceedings in the former suit and the title acquired under them can certainly not be in a better position than if they had been Appellants in that suit.

Their Lordships will humbly advise His Majesty that the Decree of the High Court should be set aside with costs and the Decree of the Subordinate Judge restored. The Respondents will pay the costs of this Appeal.
