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Fanny Skinner Vs The Bank of Upper India Limited

Court: Bombay High Court

Date of Decision: Feb. 28, 1935

Acts Referred: Companies Act, 1956 â€" Section 109

Citation: (1935) 37 BOMLR 625

Hon'ble Judges: Thankerton, J; Shadi Lal, J; Lancelot Sanderson, J; Blanesburgh, J; Alness, J

Bench: Full Bench

Final Decision: Dismissed

Judgement

Blanesburgh, J.
This is an appeal from a decree of the High Court at Allahabad, in a mortgagee Bank"s suit to realise its security. In

decreeing the suit the Court reversed a decree of the Subordinate Judge of Meerut, who had dismissed it. The suit was commenced on December

8, 1923. The mortgage had been granted, on December 8, 1911, by a Mrs. Fanny Skinner, to the Bank of Upper India, Limited. The deed was in

the ordinary form of a simple mortgage with a covenant on the part of the mortgagor for payment of the mortgage debt with compound interest at

the rate of seven per cent, per annum. In default of payment, the mortgagee Bank had the ordinary right of proceeding by Court sale to realise its

security.

2. The property comprised in the mortgage included, among other items, a one-eighth undivided share of the mortgagor in the village of Siswal and

a one-tenth similar interest in the village of Badopal. The mortgagor"s brother,. the second appellant, another brother and her sister were the co-

sharers with her in these villages. The further relevant facts with reference to them will be alluded to later. The Bank of Upper India was in 1911

still a going concern. Subsequently it went into liquidation, and the suit when brought in 1923 was -commenced by the Bank acting through its

liquidator. Fanny Skinner, the mortgagor, was then still alive, but she has died since the decree of the High Court was made and her interests are

now represented by the two first appellants, who are her heirs. To the suit as brought there was at first only one substantial defence put forward by

Fanny Skinner. It was that she was a pardanashin lady ; that the mortgage had been procured from her by her brother (not the second appellant),

whom she had entrusted with her power-of-attorney, that he had by means thereof obtained in her name from the Bank an advance of 15,000

rupees ; that no part of that advance was ever received by her; that in point of fact she had not desired to go into the transaction at all, and that

there was insufficient compliance with the formalities and conditions requisite before a mortgage executed by a pardanashin lady can be enforced

against her. That was, in the first instance, the only substantial defence Fanny Skinner put forward to the suit. Subsequently, and in the course of

the proceedings, on her statement that the fact had only just come to the knowledge of her legal advisers, she was allowed to put forward a further

defence, to the effect that the plaintiff bank was not entitled to sue by reason of the fact that there had been in 1917 an arrangement come to

between the bank by that time in liquidation and its creditors by virtue of which the whole of the assets of the Bank had been transferred to a

purchasing company, the Trust of India, Limited : that all interest in this mortgage debt had passed to the Trust so that the Bank had no longer any

right to sue in respect of it. Accordingly the following further issue was settled for decision : Were the assets of the Upper India Bank transferred to

the Trust of India, l Limited ; if so, is the plaintiff entitled to bring the present suit ?

3. There was a separate defence put forward by the mortgagor''s brother, hereinafter referred to as the second appellant. He had since the date of

the mortgage acquired in severalty the entire village of Siswal. In that character he and twenty-two purchasers from him were made defendants to

the suit as persons interested, subject to the mortgage, in the one-eighth undivided share of the village included therein. His separate defence was

that after the date of the mortgage of her undivided interest in the two villages by Fanny Skinner there had been a partition between the co-sharers,

with the result that Siswal had passed to the brothers as representing their several interests in the entirety, while the second village, Badopal, had

passed to the mortgagor and her sister. Since that partition the second appellant had acquired his brother''s entire interest in the village, Siswal.

Accordingly, his contention was that as a result two things had happened : The first that the sisters had no longer any interest in Siswal, and the

second, that he now owned the entire village in severalty and owned it free from any charge or any interest therein created by the mortgage deed in

suit. If any decree was made for the realisation of the Bank''s security, that decree should exclude entirely from its operation any interest whatever

in the village Siswal.

4. On that record the suit came on for trial, and the Subordinate Judge dealt with the three defences in this way : With regard to the mortgagor''s

defence which may be called the defence of disability, he held that the lady knew all about the transaction and that the evidence satisfied him that

she was in all respects bound by it. He rejected that defence. The second defence, however, he held to be well founded. He was of opinion that

the Bank had no right to sue. He came to the conclusion that under the arrangement made in 1917 all the assets of the Bank included in the sale

had in truth and in fact passed to the Trust of India, and that no right of action remained in the Bank in respect of any of these assets. Accordingly,

as in his judgment the mortgage debt in suit was one of the assets of the Bank included in the sale or transfer, it followed that the suit failed. He

dismissed it.

5. With regard to the separate defence put forward by the second appellant, the Subordinate Judge expressed the opinion, not of course necessary

to his actual decision, that it was mistaken in point of law as no charge which attached to the mortgagor''s undivided interest in Siswal at the date of

the mortgage could be affected by any subsequent transaction in relation to that interest to which the mortgagee Bank was no party.

6. The Bank appealed to the High Court and there the argument was directed exclusively to the issue whether the appellant, the Bank, through its

liquidator, had any right to sue. Upon that issue the High Court came to the conclusion, differing in this from the Subordinate Judge, that the right to

sue in respect of this mortgage debt remained with the Bank unaffected by the arrangement just stated. No other question was raised before the

High Court. The mortgagor did not there revive what has been called the disability defence. It was agreed before their Lordships that she was

perfectly entitled to do so had she been so minded, although she had given no notice of cross-appeal. But the question was not raised by her at all.

She confined her answer to the appeal solely to her contention that the Bank had no right of suit. With regard to the second appellant, he went one

step further in the direction of abandoning his separate defence. He did not appear on the appeal at all. The question therefore whether his village

Siswal was or was not any longer included in the security was never brought into discussion. In the result the High Court came to the conclusion on

the only question presented to it for consideration, that the Bank through its liquidator had a clear right to sue as mortgagee, and the Court made a

decree in its favour in the ordinary form, including among the property to be sold the undivided interests in both villages covered by the mortgage, a

decree which so far as the undivided interest in the village Siswal is concerned may if left be final so far as the second appellant and those claiming

under him are concerned, although he was not actually present before the Court when it was made. From the decree of the High Court, the

mortgagor"s representatives, the mortgagor having died in the meantime, presented an appeal to His Majesty in Council, and their main contention

has been that the Subordinate Judge was right in his view that the Bank had no right to sue and they maintained that contention through Mr. Dunne

in a very careful and interesting argument. That is the first point which their Lordships have to determine. It depends, first of all, upon the

construction of the agreement, which in England would be called an agreement of reconstruction and arrangement, under and by virtue of which

this particular asset was agreed to be transferred to the Trust of India, Limited, by the Bank. The agreement contains one or two provisions to

which it is desirable to refer. It is dated July 16, 1917. It is a very carefully and elaborately drawn document and it sets forth in its recitals the

whole history of the transaction to which it gives effect. The Bank of Upper India had in the liquidation issued to some of its creditors in respect of

their claims against it certain debenture stock secured by a trust deed. The purpose of the agreement was to make it possible to come to an

arrangement with the other creditors of the Bank so that by the appropriation and realisation of certain assets for their benefit, with the consent of

the trustees for the debenture stock, all claims against the Bank would be got rid of, and subsequently in due course the Bank would be dissolved.

The way in which all this was done was as follows : Special resolutions were passed authorising the execution by the liquidator of the Bank of the

agreement of sale to the Trust of India now in question. The agreement was thereafter duly executed and no question is raised as to its complete

validity according to its tenor. The only question to be determined now is its effect so far as the transfer of this particular mortgage debt from the

Bank to the Trust is concerned. That the mortgage debt was included in the agreement cannot, their Lordships think, be questioned. Among the

assets so included are those in paragraph 1 of the agreement as ""all the book and other debts due to the Bank in connection with the said business

and the full benefit of all securities for such debts.

7. The terms of sale are important. It is provided that the Trust is to make payment by means of a transfer of certain shares of its own and of

certain other shares of another company of which apparently it was possessed, and is further to indemnify the Bank against all its debts and

liabilities of every kind. There is a special provision with regard to completion not unimportant. It is found in paragraph 7, which is as follows :

The purchase shall be completed on the 16th day of July, 1917, or on such other date as the parties hereunto shall mutually agree at Meerut and

the Trust shall thereupon cause to be allotted issued or transferred the said share and fixed deposit receipts forming the consideration for the said

sale and the Bank and its liquidators and the trustees and all other necessary parties (if any) shall at the expense of the Trust execute and do all

such assurances and things for vesting the said premises on the Trust or as the Trust shall "direct and giving to it the full benefit of this agreement as

shall be reasonably required.

Then paragraph 8 says this :

The possession of the said premises shall be retained by the Bank and its liquidators up to the said 16th day of July, 1917, and in the meantime

they shall carry on the said business in the same manner as heretofore so as to maintain the same as a going concern and they shall as from the 1st

day of July, 1917, be deemed to have been and to be carrying on such business on behalf of the Trust and shall account and be entitled to be

indemnified accordingly.

8. Apparently it happened in this case, as it has happened in so many others, that this agreement was executed on a date subsequent to that on

which the draftsman supposed that it would be executed. In terms the purchase was to be completed on the very day of its execution, July 16,

1917, and the business was to be carried on by the Bank up to the date of the agreement as from a previous date, July 1. All that, however, is

unimportant in regard to the transaction with which their Lordships have to deal. Quite obviously, the completion might take place at a date later

than the date of the agreement, as is amply enough provided for by the agreement itself, and on completion all those things would have to be done

which are therein stated,-the consideration would have to be paid and satisfied, the formal transfers would have to be executed, and so on.

Nothing of that kind took place. There never was in that sense any completion at all, nor was this agreement registered under the Transfer of

Property Act. Accordingly, and their Lordship think this is common ground-the agreement as a transfer of the security was of no effect by reason

of non-registration, and, so far as appears, this particular asset has never found its way into the legal ownership of the Trust at all, or, putting it in

another way, it has never passed out of the ownership of the Bank so as to deprive the Bank of any right that it had before to sue in respect of it.

On such grounds as these, the High Court came to the conclusion that the right to sue had not passed from the Bank and that the Bank was,

therefore, entitled to maintain the suit. But they came to that conclusion, as Mr. Dunne pointed out, by reason of the view they took that there was

no possibility of treating the agreement as an assignment to the Trust of the benefit of Fanny Skinner''s covenant to pay, apart, from the security

given to provide for payment. Accordingly, so it was contended, the reasoning of the High Court was not apt to meet all the facts of the case.

While counsel had to agree, and in fact it became part of his case, that there had been no legal transfer of the security, he contended on the

authority of a decision of this Board, which will be referred to in a moment, that the transfer of the unsecured debt had been completed and that in

respect of that unsecured debt no one could sue except the Trust, so that the effect of the transfer of the unsecured debt to the Trust, a transfer

complete and effective without registration-had been to deprive the Bank of any right whatever to take any step in respect of the security although

on that footing it still remained in it. That was Mr. Dunne"s contention. Their Lordships will only say before meeting it otherwise that it would, if

sound, produce a very remarkable result, namely, that so far as the transaction of transfer is concerned, the mortgagor, unless the transferor and

transferee could agree, was released so far as the security was concerned from all liability whatever, for the mortgagee after transfer of the debt

could take no steps in relation to the security. That is truly an extraordinary result, and their Lordships would hesitate long before they came to the

conclusion that it was one necessarily involved in the transaction. But it was said that such was the effect of a judgment of this Board in a case to

which allusion has already been made ; namely, the case of (1931) L.R. 58 I.A. 323 (Privy Council) . The judgment was given on May 21, 1931,

that is to say, after the decree of the High Court in this case. There two debentures had been issued to the Imperial Bank of India by the Bengal

National Bank, which had later gone into liquidation. The debentures charged by way of a floating charge all the assets whatsoever of the Bengal

Bank. These consisted largely of loans and advances that had been made by that Bank to customers secured in many instances by the deposit of

the title deeds of immovable property. The debentures had neither of them been registered under the Indian Registration Act, 1908, though both

had been duly registered pursuant to Section 109 of the Indian Companies Act, 1913 It was contended in these circumstances that the debenture

holders, the Imperial Bank, as a result of liquidation, were entitled to no remedy whatsoever, direct or indirect, against the immovable property that

had been pledged to the Bengal Bank. It was with such a case that their Lordships dealt in a judgment delivered by Lord Atkin. It was admitted

there by the Imperial Bank, without its having been argued, that they had no charge upon the immovable property of the Bengal Bank. The Board

accepted and acted upon the admission but they definitely refrained from holding that in the case of a company it was necessarily true, that a

debenture charging immovable property and registered under the Indian Companies Act must in order to have complete effect be registered also

under the Indian Registration Act, While not indicating any view one way or the other on that point, their Lordships treated the case as one in

which it must, as between the parties, be assumed that the debentures created no charge upon any portion of the immovable property of the

Bengal Bank whether its interest therein was by way of deposit of deeds or otherwise. Therefore, that was a case of what might be called a clean

debt owing to the Bengal Bank and unsecured so far as immovable property was concerned being included in the debenture charge ; and the

question was whether the charge upon that clean debt operated to give to the Imperial Bank, as debenture holders, the right themselves to sue the

debtors for payment. On this, it was held that the debentures did not constitute actionable claims which by virtue of the Act in that behalf could be

sued upon after due notice of transfer had been given to the debtor. The claims had to be placed in an entirely different category; and the category

to which Lord Atkin relegated them was this : The claims were such as might be made by the debenture holders against the Bengal Bank ; but, so

far as any recourse might be competent to them in respect of any security taken by the Bengal Bank in respect of any of the debts, the debenture

holders must enforce such security in the name of the Bengal Bank and not otherwise, and if any difficulty arose, the Bengal Bank would be

required on proper terms to lend its name as plaintiff in any proceedings that might be necessary. This case, therefore, when examined, instead of

supporting the view for which it was cited by Mr. Dunne, appears to destroy it, because Lord Atkin quite clearly states that, if any proceedings are

taken for the purpose of vindicating the rights >of the holder of such a debenture as was there in question, these must be taken not in the name of

the transferee, the debenture holder, but in the name of the original creditor, the Bengal Bank. Applying that case, which need not be gone into in

more detail, to the present, the result is this, as it appears to their Lordships : The transfer of this mortgage debt was effective as between the

transferor and the transferees. But any proceedings to recover the debt brought against the mortgagor must be, not in the name of the transferee,

but in that of the transferor. Accordingly, what was here done by the Bank of Upper India in suing in its own name to recover this mortgage debt

was rightly done. It was, indeed, the only course that could have been appropriately adopted. The decree in its favour cannot be disturbed on this

ground. But it must not be taken to be the view of their Lordships that there would not be other difficulties in the way of the contention put forward

by the first appellants that the Bank has no title to sue. As has been said, there has been no completion of this agreement in any sense whatever ; it

remains just where it was so far as any substantive legal assignments are concerned, although, no doubt, one may at this distance of time almost

assume that the consideration has been paid and satisfied. Their Lordships can have no doubt that the debts of the Bank have been satisfied or

discharged, and that the transaction as between the transferor and transferee may be taken to be complete. But this has only been by mutual

arrangement and acceptance by the transferees of less than they were entitled to ; it remains that there has been no completion in any legal sense of

the word and no legal assignment or transfer of the assets included in the agreement and not legally transferred by virtue of the agreement itself.

When learned counsel for the appellants were asked what was the moment of time at which, in their view of this transaction, the debt passed to the

Trust so that the Bank remained with no interest to sue in respect of it, the first ; answer made was that it passed from the moment of execution of

the agreement ; an answer which meant that the whole interest in the property agreed to be transferred passed before any part of the purchase

price had been paid. This answer was not pressed. Then it was suggested by Mr. Hyam that, if that was not so, the whole interest certainly passed

when all this property had been beneficially transferred and had become vested in that sense in the purchasing Trust. To which there was made

these answers. - First, there was no evidence at all as to when that stage was reached, if it ever has been reached, and, secondly,, if that stage ever

has been reached, it would be very important on this question of right to sue to know what the terms were on which the transfer was effected. The

High Court in their judgment have said that there was an arrangement as between the Bank and the Trust under which the right to recover these

outstanding debts was to remain vested in the Bank, although; I, when recovered the proceeds would be handed over to the Trust, But whether

that be the fact or not, there is no evidence of any transaction which would justify the conclusion that this purchase had been completed in

accordance with the terms of the agreement, and, therefore, the result is that for this reason also the suit was properly brought.

9. Two subordinate questions already foreshadowed in the course of this judgment must now be dealt with.

10. The first is that the appellants having stated that they had not in the High'' Court again raised the disability defence, asked leave to reopen that

question. Their Lordships were not disposed to grant any such leave in this case ; it appears to be one which comes within the general view of the

Board as expounded by Lord Robertson in the case of (1907) L.R. 34 I.A. 164 (Privy Council) . Their Lordships do not think that the Board in

that case-intended to lay it down that in no case could such leave be granted. The Board, acting under the Prerogative, must never abrogate their

duty to tender to His Majesty in such a matter any advice which the nature of the case seems, in justice, to be called for. But the circumstances in

which such an application will be entertained are necessarily exceptional.

11. Mr. Dunne contended that in the case before the Board in Dhanukdhmi Singh v. Mahabir Pershad Singh the question which the appellants then

desired to raise was one which they might have raised as appellants in the High Court. Indeed, it was included in their notice of appeal to the High

Court, but was not raised by them there. In the present case, however, the point which the appellants desire to revive was one which would only

have been open to them as respondents in the High Court and not as appellants. Their Lordships, however, apart from special circumstances

which have not been shown to exist here, can see no distinction in principle between the position of an appellant who abandons in the High Court a

ground of appeal of which he had given; notice and the position of a respondent in the High Court who does not raise a point in his favour which

was open to him. without notice. It is quite true that it would be open to the Board on proper terms to refer to the High Court this question for their

consideration. But even that the Board would not do except under special circumstances. These do not exist in this case, the real truth being that

here the appellants before the High Court were content to rely on a technical point, altogether abandoning the defence of substance which had

failed in the Court below. Now, having failed on that technical point,, they ask as a last resort to set up again their abandoned defence of

substance. That consideration shows how little is the warrant here for interfering with the usual practice of the Board in such matters. Accordingly,

the application-made to reopen the disability defence either before their Lordships or in the High Court is one that cannot be acceded to The other

matter that has to be dealt with is that raised by the second appellant with reference to the inclusion in the decree 6f the village Siswal. He desires

that he may be permitted to establish, if he can, at the proper time that by virtue and as a result of the partition effected as already stated, and of

the subsequent transactions, he is now the registered owner of this village in its entirety, subject to the rights which he has created in it, but

discharged from the respondents'' security. He seeks to establish that this village is now excluded altogether from the security which is held by the

Bank, and that no sale of property directed for the purpose of realising that security should be permitted to touch or affect his village, and he relies

for the success of that contention which he desires to put forward on the case of Mohammad Afzat Khan v. Abdul Rahman (1932) L.R. 59 IndAp

405 : 35 Bom. L.R. 1; the headnote, which quite clearly expresses the judgment, being this :

Where one of two or more co-sharers mortgages his undivided share in some of the properties held jointly, the mortgagee takes the security

subject to the right of the other co-sharers to enforce a partition and thereby to convert what was an undivided share of the whole into a defined

portion held in severalty. If the mortgage, therefore, is followed by a partition and the mortgaged properties are allotted to a co-sharer or co-

sharers other than the mortgagor, they take the allotted properties, in the absence of fraud, free from the mortgage, and the mortgagee can proceed

only against the properties allotted to the mortgagor in substitution for his undivided share.

When Mr. Parikh, on behalf of the second appellant, asked to have the decree amended in that respect, so as to discharge his village from this

security altogether, it was, of course, objected by Mr. DeGruyther, on behalf of the respondents, that Mr. Parikh was no longer in a position to

raise this point by reason of the fact that he had abandoned it in the High Court, secondly, it was contended by Mr. DeGruyther that there was no

material upon which any decision in the second appellant''s favour could be made, and thirdly, he contended that the application was unnecessary

because the point would be open to Mr. Parikh in execution proceedings, when an application would have to be made to the Court for directions

for sale. It would then be open to the second appellant to come forward and claim that his village be excluded from the property to be sold. But,

when it was made plain that Mr. Parikh''s client was a party to the proceedings in which the decree of the High Court was made, and that an

undivided share in Siswal was thereby stated to be within the security, it became clear that it would be difficult, if not impossible, for the second

appellant successfully to apply that the one-eighth share in the village should be excluded from the sale. It was then agreed that there should be

inserted in the advice which their Lordships would humbly tender to His Majesty a recommendation that provision should be made in the Order in

Council to the effect that notwithstanding the terms of the decree of the High Court at Allahabad of December 3, "1928, it was to be open to the

second appellant in any execution proceedings thereunder to establish, if he could, that no undivided or other interest in the village Siswal is any

longer comprised in the mortgage of December 8, 1911, Had this agreement not been reached, it would not have been possible for their Lordships

to make any order either in favour of or against the second appellant on this head, if only for the reason that the circumstances in relation to the

alleged partition are not really known to them.

12. In these circumstances, their Lordships will humbly advise His Majesty that this appeal be dismissed. The appellants must pay the costs. There

will be inserted in the advice which they will so tender ""a recommendation to the effect just stated with reference to the claim put forward by Mr.

Parikh on behalf of his client.