

(1937) 06 CAL CK 0003

Calcutta High Court

Case No: Appeal from Original Order No. 315 of 1935

Gopal Hari Ghose Chowdhury

APPELLANT

Vs

The Jessore Loan Co., Ltd., and
Others

RESPONDENT

Date of Decision: June 22, 1937

Final Decision: Allowed

Judgement

Costello, A.C.J.

1. This case presents another example of the shocking manner in which unscrupulous and dishonest judgment-debtors can harass, delay and possibly in the end defeat their creditors. A decree was obtained on a mortgage as long ago as the 3rd May, 1928. In execution of the decree, the judgment-debtor's immovable properties were brought to sale on the 30th April 1934, nearly six years after the decree had been made and were purchased by the decree-holders. On that date an order was made that the matter should be put up before the Court on the 30th May, 1934, for confirmation of the sale. Then there ensued the all too frequent maneuver adopted by the judgment-debtors. On the 30th May, 1934, the very date on which the sale would have been confirmed, the debtor proceeded to file a petition under the provisions of or 21, r. 90 of the Code of Civil Procedure.

2. That petition, in accordance with what seems to be the Mofussil practice in this matter, was registered as a Miscellaneous Case. That case pursued a halting course for at least several months until at last on the 6th March, 1935, nearly seven years after the date of the decree the judgment was given out of which this appeal arises. Unfortunately for the judgment-creditor a Receiver had been appointed and accordingly the decree-holder thought that they were in a position to take the point that as the sale of the properties had taken place while they were in the hands of the Receiver, it was no longer open to the judgment-debtor to take objections under the provisions of Or 21, r. 90. That view of the matter was accepted by the learned Judge and accordingly he said:-

If the petitioner himself is allowed to maintain an application for setting aside a sale which the Receiver and the Court appointing him have allowed to be held, it will interfere with the work of the Receiver.

3. He further said:-

So long as there was a Receiver, the petitioner was not entitled to maintain any application for setting aside the sale. If the petitioner thinks that the Receiver has by his willful default or gross negligence caused loss to the property of the petitioner, he has his remedy under Order No. 40, rule 4 of the Civil Procedure Code.

4. The question we have to decide is whether the view taken by the Subordinate Judge of Jessore as expressed in the passage I have just read is correct. It was argued on behalf of the Respondents in this appeal that the rights of the judgment-debtor are vested in the Receiver, and it may well be that the Receiver has all the rights which the owner of the property had. But unfortunately for the decree holders, the terms of or. 21, r. 90 are so wide that it seems impossible to hold that even where a sale takes place with the concurrence and with the full knowledge of the Receiver, the judgment-debtor is shut out from taking action under the terms of r. 90. It is to be borne in mind that an application to set aside a sale on the ground of irregularity or fraud may be made by any person whose interests are affected by the sale. It seems obvious in the present instance that the Appellant Gopal Hari Ghose Chowdhury is a person who fulfils that description, and therefore he was in a position to challenge the validity of the sale on the ground of irregularity or fraud. That the existence of a Receiver does not exclude the judgment-debtor in the circumstances such as the present seems to me to be tolerably clear from the decision in the case of Madaneswar Singh v. Mahamaya Prosad Singh 15 C. W. N. 672 (1911). In that case a Receiver was actually appointed after the sale in execution of a mortgage decree had taken place. He was appointed for the purpose of preserving the interest of the parties pending the determination of an application which had been made by the mortgagor to have the sale set aside. The judgment of the Court which consisted of Mr. Justice Mookerjee and Mr. Justice Teunon contains this passage at page 674:-

We are not prepared to adopt as well founded the contention of the Appellants that a mortgage suit terminates as soon as the sale had taken place. In the case before us the sale has not been confirmed. The judgment debtors have presented an application to contest its validity. If that application succeeds and the sale is reversed, it will be obligatory upon the decree-holders, to revive the execution of the decree and bring the properties to sale again. In fact it is well settled that for the purposes of the application of the doctrine of *lis pendens*, a mortgage suit continues after the decree till the sale has become final.

5. At page 675 the learned Judges say this:-

In the events which have happened, it cannot be seriously questioned that there is still a pending action in which a Receiver may be appointed.

6. It will seem from the decision in that case that the appointment of the Receiver did not deprive the judgment-debtor of the privilege which he has to his own advantage and to the great detriment of his creditors-of filing a petition and pursuing proceedings under or. 21, r. 90. It is with regret that we come to the conclusion that this appeal must be allowed and the order made by the learned Subordinate Judge set aside, he is directed to hear the application on its merits. In the circumstances of this case we make no order as to costs.

Edgley, J.

I agree.