(1961) 02 CAL CK 0008

Calcutta High Court

Case No: Appeal from Original Order No. 110 of 1960

Nitai Charan Bagchi		APPELLANT
	Vs	
Suresh Chandra Paul		RESPONDENT

Date of Decision: Feb. 7, 1961

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 11 Rule 12, Order 23 Rule 3, Order 7 Rule 10

Citation: 66 CWN 767

Hon'ble Judges: Niyogi, J; Banerjee, J

Bench: Division Bench

Advocate: Bhabesh Chandra Mitter and Mritunjoy De, for the Appellant;Provas Kumar Sen, for the Respondent

Final Decision: Dismissed

Judgement

Banerjee, J.

Plaintiffs, who are the appellants, instituted a suit, in the City Civil Court, Calcutta, inter alia, praying for a declaration that a mortgage decree passed by the High Court, in its Ordinary Original Civil Jurisdiction, in suit No. 821 of 1946, against them was void and not binding upon them being tainted with and vitiated by fraud. There was a consequential prayer for permanently restraining the defendants decree-holders from proceeding with the execution of the decree. The plaintiffs valued the suit at Rs. 501- for declaration and Rs. 5/- for injunction.

2. The defendants, Nos. 1 to 3, who are some of the respondents filed an objection u/s 14 of the City Civil Courts Act read with Order 7, rule 10 of the CPC contending that the City Court had no pecuniary jurisdiction to entertain the suit, which should have been valued at above Rs. 30,000/-, the amount of the mortgage decree, and further that u/s 5(4) read with item 7 of the First Schedule of the City Civil-Courts Act, that Court had no jurisdiction to try the suit.

3. Section 5 (4) and item No. 7 of the First Schedule of the City Civil Courts Act are quoted below:

Section 5(4). "The City Civil Court shall have no jurisdiction to try suits and proceedings of the description specified in the First Schedule.

Item No. 7 of the First Schedule. "Suits or proceedings relating to or arising out of mortgages of, or charges or lien on, immovable property.

4. The trial Court upheld the second contentions of the defendant Nos. 1 to 3 with the following observations:

On the face of it, the suit relates to the mortgage decree or arises out of it and so it is contended that it does not relate to or arise out of a mortgage. But the very basis of the mortgage decree is the mortgage. We cannot think of the decree apart from its basis, the mortgage. So I hold that the suit relates to or arises out of the mortgage of immovable property.

5. In that view the Court below directed the return of the plaint for presentation to the proper Court.

6. The propriety of the order is being disputed in this appeal.

7. Mr. Bhabesh Chandra Mitter, learned Advocate for the plaintiffs-appellants, contended that after the passing of a decree on a mortgage, the original relationship between the parties comes to an end and the relationship between the parties becomes that of judgment-debtor and judgment-creditor and no longer that of lender and borrower. A suit to declare a mortgage decree void, he contended, would not, therefore, be a suit relating to or arising out of mortgage, within the meaning of Item No. 7 of the First Schedule of the City Civil Court Act. Mr. Mitter relied on the decisions reported in (1) L.R. 63 IndAp 114 (Kusum Kumari v. Debi Prosad Dhandhania) and (2) L.R. 72 IndAp 156. (Renula Bose v. Rai Manmatha Nath Bose) in support of his contention.

8. The case reported in (1) L.R. 63 IndAp 114 (supra) was one for enforcement of a mortgage in a court in the Santhal Parganas. Section 6 of the Santhal Parganas Settlement Regulations (III of 1872) provided:

6. All courts having jurisdiction in the Santhal Parganas shall observe the following rules relating to usury, namely,

(a) Interest on any debt or liability for a period exceeding one year shall not be decreed at a higher rate than two per cent, per mensem, notwithstanding any agreement to the contrary, and no compound interests arising from any intermediate adjustment of account shall be decreed.

(b) the total interest decreed on any loan or debt shall never exceed one-fourth of the principal sum, if the period be not more than one year, and shall not in any

other case exceed the principal of the original debt or loan.

9. The trial court applied the provisions of the aforesaid Regulations and passed a preliminary decree for Rs. 4,12,662-13-0 including principal, interest and cost and allowed the mortgagees further interest at the rate of six per cent per annum until realisation. The decree was affirmed by the Tatna High Court. The judgment-debtor appealed to the Privy Council and one of the points canvassed before the Privy Council was that the allowance of interest on the decretal amount contravened section 6 of the Regulation aforementioned. Sir George Lowndes, who delivered the judgment, negatived the contention with the following observations:

Section 6 of the Regulation only lays down that in a case such as the present the interest decreed on the loan or debt is not to exceed the principal. When once a decree has been passed the loan or debt as the subject of enforcement no longer exists; it is in effect merged in the decree, and the allowance of interest on the decree is not the allowance of additional interest on the loan or debt. That this is the effect of the decree is clear on the judgment of the Board in the case last cited, where Lord Davey says (L.R. 52 IndAp 418, 433):

''(Their Lordships) think that the scheme and intention of the Transfer of Property Act (now the corresponding provisions of the Civil Procedure Code) was that a general account should be taken once for all, and an aggregate amount be stated in the decree for principal, interest, and costs due on a fixed day, and that after the expiration of that day, if the property should not be redeemed the matter should pass from the domain of contract to that of judgment, and the rights of the mortgagee should thenceforth depend, not on the contents of his bond, but on the directions in the decree.''

Their Lordships also think that the passage quoted above from Lord Davey''s judgment is decisive of the mortgagees'' appeal. Up to the date fixed for redemption the matter between the parties is one of their contract, and what the court has to consider is how much does the law allow them to recover under it. This is determined by the Regulation, and is limited to twice the amount of the principal. If that limit had been reached before the institution of the suit no further interest could be allowed between that date and the date fixed for redemption.

10. In the other case relied upon by Mr. Mitter, (2) L.R. 72 IndAp 156, (supra) the question that arose for consideration was where a decree against a judgment-debtor for money lent had, before the coming into operation of the Bengal Money Lenders Act, 1940, been assigned to one who took it bonafide and for value, whether the judgment-debtor could, by virtue of section 36(5) of the Act of 1940 claim any relief against the assignee. Answering the question in the negative, Lord Goddard, who delivered the judgment of the Privy Council observed:

The Act, No. X of 1940, was passed to regulate and control money-lenders and money-lending transactions in Bengal and applies to loans made by any one and not

only by professional money-lenders. Its main provisions, so far as are material for present purposes, are that maximum rates of interest are prescribed, and no borrower is to be liable to repay to a lender more than twice the amount of the principal advanced whatever the rate of interest may be. Provision had naturally to be made for cases where the lender assigned his rights, and Chapter V of the Act, ss. 28 and 29, deal with the assignment of loans. These two sections were meticulously examined by both the trial Judge and the court on appeal, but in the opinion of their Lordships these sections have no application to the present case. They deal with the assignment of loans where the relation of lender and borrower still exists; while, that is, the contract is still executory. They do not apply where there has been a judgment. The contract is then merged in the judgment and the relationship between the parties is that of judgment-creditor and judgment-debtor and no longer that of lender and borrower. If authority be needed for this proposition, which is really elementary, it will be found in the case referred to by Edgley, J. of (1935) L.R. 63 I.A. 114 (Privy Council) . The section which gives relief to the borrower is s. 30, which, so far as is material, is as follows:

Notwithstanding anything contained in any law for the time being in force, or in any agreement, no borrower shall be liable to pay after the commencement of this Act-(a) any sum in respect of principal and interest which together with any amount already paid or included in any decree in respect of a loan exceeds twice the principal of the original loan,....whether such loan was advanced or such amount was paid or such decree passed or such interest accrued before or after the commencement of this Act;

The effect of this section is to afford a defence to a borrower as to the amount for which he is liable, and that is all that it does.

It does not affect judgments already obtained, but merely provides that the amount of a judgment already obtained is to be taken into account in calculating the final amount for which a borrower may be liable. So if, for instance, the original loan were for Rs. 1,000, and the principal and interest were payable by instalments, and a decree had been obtained for Rs. 500, not more than Rs. 1,500 could be obtained under any subsequent decree. That section, therefore, cannot of itself avail a judgment-debtor against whom a decree has been regularly obtained and remains unreversed.

11. Neither of the two decisions above referred to affords any assistance to the resolution of the question, which we have to decide, namely, whether Item 7 of the First Schedule of the City Civil Courts Act, 1953, covers a suit for declaration of a mortgage decree void on the ground of fraud.

12. The phrases, "relating to" or "arising out of" are phrases of great comprehensiveness. Order 11, rule 12 of the CPC (corresponding to Order 31, rule 12 of the Rules of the Supreme Court, 1883 prevailing in England) provides, "any

party may, without filing any affidavit, apply to the Court for an order directing any other party to any suit to make discovery on oath of the documents which are or have been in his possession or power relating to any matter in question therein. The words "relating to" in the aforesaid rule have been taken to mean and include documents which may throw any light on the case and shall as such be taken to be documents relating to the matters in question in the suit.

13. In "Compagnie financiere v. Peruvian Guano Co. (3) (11 Q.B.D. 55)" Brett, L.J. defining words similar to those used in R.S.C., Order 31 rule 12, "relating to any matter in question", said: "It seems to me that any document must be properly held to relate to matters in question in the action which not only would be evidence but which it is not unreasonable to suppose does contain information which may either directly or indirectly, enable a party either to advance his own case or to damage the case of his adversary. I used the expression, ''directly or indirectly'', because it seems to me that a document may be properly said to be material if it is one which would naturally lead a party to a chain of enquiry which would lead to one of those results."

14. In the case of (4) Srinivas Prosad Singh v. Kesho Prosad Singh, reported in 14 C.L.J. 489. Mookerjee and Carnduff, JJ. held that the expression "an order relating to execution of a decree" was comprehensive enough to include an order relating to the stay of execution thereof.

15. Then again, in deciding on the scope and effect of the words "shall pass a decree in accordance therewith so far as it relates to the suit", as in Order 23, Rule 3 of the Code of Civil Procedure, dealing with compromise of suits, Baker and Nanavati, JJ., observed in the case of Shambhu Singh Sujansing Thakor v. Manilal Vadilal Gandhi (5) (A.I.R. 1932 Bom, 47) : Where the clause is a consideration of the compromise and therefore intimately connected with it the words ''that relates to the suit'' are sufficiently wide to embrace such a term of the compromise, as for instance, the consideration for the compromise, even though this consideration may be entirely outside the scope of the suit and relate to property which was never in question in the suit itself.

16. Again, in the case of (Sahu) Shyam Lal Vs. M. Shayamlal, Sulaiman, C.J. observed:

It is clearly possible to conceive of the matters which may not strictly speaking be the subject matter of the suit itself as brought and yet they may relate to the suit.

17. The meaning of the expression "arising out of" has been repeatedly considered in connection with employers'' liability for payment of compensation to a workman "if personal injury is caused to a workman by accident arising out of and in course of his employment" (See section 3 of Workmen''s Compensation Act). The expression has been taken to mean that "during the work of the employment, injury has resulted from some risk incident to the duties of the service, which unless engaged in the duty owing to the master, it is reasonable to believe the workman would not

otherwise have suffered." (See Halsbury''s Laws of England, Vol. 34, 2nd Edition, page 823).

18. And in the case of Associated Banking Corporation of India Ltd. and Others Vs. Nazaralli Kassambhai and Co. and Others, Chagla, C.J. and Bhagabati, J., pointed out the difference between the two expressions "relating to" and "arising out of" in the following language:

Our attention has been drawn to analogous law to be found both in the Insolvency law here and the Bankruptcy law in England. Section 105, Bankruptcy Act, 1914, provides:

Subject to the provisions of this Act, every Court having jurisdiction in bankruptcy under this Act shall have full power to decide all questions of priorities and all other questions whatever, whether of law or fact, which may arise in any case of bankruptcy coming within the cognizance of the Court.

And our own section 7 Presidency-towns Insolvency Act, is in identical terms. And there is a similar provision in section 4, Provisional Insolvency Act. It has been held both in England and here that under this section the Insolvency Court has jurisdiction to try questions of title against strangers to the insolvency and also questions arising out of the contract which a stranger entered into with the insolvency before his insolvency. In other words, the view taken both by the English and Indian Courts is that this section does not restrict the jurisdiction of the Court to trying only those matters which arise by reason of the supervention of the insolvency. Even if the right existed in the solvent and it was that right which was being enforced against a stranger, if by reason of the adjudication the Official Assignee can prosecute that right and that claim, that matter can be considered by the Insolvency Court u/s 7, Presidency-towns Insolvency Act and u/s 105, Bankruptcy Act, 1914.

Now, it will be noticed that the language used by the legislature in our section 7 and section 105 of the English Act is merely a question which may arise in any case of insolvency. The language used in the Banking Companies Act is much wider. It is not merely a matter arising out of the winding up or a matter arising in the course of the winding up, but also a matter relating to the winding up of a banking company.

19. The meaning and scope of the phrases "relating to" and "arising out of" being, of the comprehenssiveness as indicated above we have to hold that suits which either directly or indirectly relate to or arise out of mortgages fall within the mischief of Item 7 of the First Schedule of the City Civil Courts Act, 1953.

20. In the instant case the question for consideration will be whether the relationship between the plaintiffs and the defendants as mortgagors and mortgagees rightly ended in the. mortgage-decree, and whether that decree had been validly obtained. The question, beyond doubt, ultimately relates to the

mortgage. If the decree be set aside the mortgage revives; if not, the relationship between the plaintiffs and the defendants remains culminated in a mortgage decree under which the plaintiffs remain judgment-debtors.

21. In the view that we take, we hold that the Court below was right in holding that the case fell within the mischief of Item 7 of the First Schedule of the City Civil Courts Act, 1953 and was also right in returning the plaint.

22. We, therefore, dismiss this appeal. The argument on behalf of the respondents was singularly unhelpful. We, therefore, make no order for costs in this appeal.

Niyogi, J.

I agree.