(1917) 12 CAL CK 0020

Calcutta High Court

Case No: None

Sheikh Samiruddin and Others		APPELLANT
	Vs	
Sheikh Abdul Syed and Others		RESPONDENT

Date of Decision: Dec. 18, 1917

Citation: 44 Ind. Cas. 734

Hon'ble Judges: Smither, J; Charles Chitty, J

Bench: Division Bench

Judgement

Charles Chitty, J.

The plaintiff brought this suit to establish his right under a Kat Kobala, dated 22nd February 1906, executed by Abdul Hakim, predecessor-in-interest of defendants Nos. 1 to 4. Defendants Nos. 5 and 6 were added as claiming the mortgaged property under a prior title. The suit was decreed by the Munsif, but on appeal the decree was set aside and the suit dismissed. The plaintiff has appealed to this Court. The facts found are as follows: On 15th October 1895 Abdul Hakim and Abdul Sobhan mortgaged certain properties to Baroda Prosad De and Sasil Kumar De, defendants Nos. 5 and 6. The mortgagees brought a suit (No. 161 of 1902) to enforce their mortgage. On 27th January 1903 a petition of compromise was filed and the suit decreed in accordance therewith (Exhibits A and 0). By that the decretal amount was fixed at Rs. 4l7 and arrangement made for payment by instalment with the usual default clause. It was further provided that if the whole amount should not be recovered by sale of the mortgaged properties, the plaintiffs would be entitled to recover it by sale of certain other properties specified in the schedule to that petition. The mortgagors declared that they had created no other charge on those properties, and the petition went on to say: "The aforesaid decretal amount Rs. 447 or any portion thereof shall be a charge on the mortgaged properties mentioned in the plaint and the properties described in the schedule to this petition, and the aforesaid Rs. 447 shall be recovered according to the instalments mentioned before and in default of payment it shall be recovered at once from the mortgaged property and the properties mentioned in the schedule to this petition. The money

shall be recovered according to the terms mentioned above and so long as the whole amount is not realised it shall remain a charge thereon." The instalments were not paid and the decree holders, defendants Nos. 5 and 6, brought Execution Case No. 361 of 1908 to enforce payment. The properties comprised in the mortgage and also those which purported to be charged under the compromise were brought to sale on 12th January 1904 and purchased by the decree-holders themselves. The sale certificate was made out on 22nd February 1904 and possession was given to them by the Court on 26th July 1905. On 19th September 1905 Abdul Hakim applied to set aside the sale (Miscellaneous Case No. 177 of 1905). In that case a Solenama was filed on 17th March 1906 (Exhibit B). By that it was agreed that if Abdul Hakim paid to the decree-holders the full amount of the decree within two months, the sale of the mortgaged properties and of the other properties under the terms of the previous compromise should be set aside. If he failed to pay then the sale of the mortgaged properties (lot No. 1) should be confirmed, and for the balance due in excess of the sale-proceeds the properties included in the compromise (i.e., lot No. 2) should be put to sale again. It would appear from the order sheet of Execution Case No. 361 of 1903 that the Court allowed an adjournment of two months, presumably for the compromise to be carried out by payment by the judgment-debtors. It is stated in the written statement of defendants Nos. 5 and 6 that the judgment-debtor having failed to pay, the sale of the mortgaged properties remained confirmed and that of'' the remaining properties was'' cancelled. We adjourned the hearing of this appeal for the production of the order sheet in Miscellaneous Case No. 177 of 1905 that we might see exactly what orders the Court passed in that matter. It was apparent that the sale of the properties charged having been effected by the Court could only be set aside by an order of Court. The appellant, however, failed to produce the document required. It appears, however, also from the written statement of defendants Nos. 5 and 6 that they again took out execution of the decree (Execution Case No. 191 of 1906) and brought the properties charged and other properties to sale and purchased them themselves on 16th January 1907. That sale was confirmed by the Court on 4th March 1907 and possession given to the decree-holders by the Court on 1st May 1907. The present suit was filed 5 years later on 27th May 1912. It is to be noted that the mortgage, which the plaintiff is now seeking to enforce, was executed on 22nd February 1906, about a month before the compromise petition in Miscellaneous Case No. 177 of 1905. It is expressed to be made, and the money borrowed for the purpose of paying off defendants Nos. 5 and 6 the decree-holders in Suit No. 161 of 1902. The plaintiff must, therefore, be taken to have had notice of the then existing state of facts. What then was the legal position of the parties at that time? It has been argued before us for the plaintiff appellant that no valid charge was created upon the properties, lot No. 2 by the Solenama (Exhibit A) and the decree (Exhibit C). It was urged that to create a valid charge registration of the document creating it was necessary. That is clearly not so. The distinction between a mortgage and a charge u/s 100 of the Transfer of Property Act is that in the case of

the former there is transfer of the property to the creditor, which requires registration, in the case of the latter there is no such transfer. The debtor only agrees that the property shall be security for the repayment of the debt. It may be conceded that the consent decree of 27th January 1903 could not affect the properties row in question, which were not the subject-matter of that suit, No. 161 of 1S02. Bat there was nothing to prevent the judgment-debtors by agreement from creating a valid charge upon properties outside the suit, and that they undoubtedly purported to do by the petition Exhibit A. It is not, however, necessary to decide as to the validity of the charge. These properties (lot No. 2) were undoubtedly brought to sale by the Court in execution of that decree and sold to the decree-holders. Whether there was a formal attachment or not does not matter, as the sale was with the consent and at the request of the judgment-debtors. This being so, it is clear that all right, title and interest of the judgment-debtors to and in those properties were extinguished on 12th January 1904. When, therefore, Abdul Hakim purported to mortgage these properties to the present plaintiff on 22nd February 1906, it is clear that he had no subsisting interest in them which he could transfer to the plaintiff. If the sale of these properties was subsequently set aside, and Abdul Hakim thus again acquired some interest in those properties, the plaintiff might have claimed that his mortgage should operate on that interest (see Section 43, Transfer of Property Act). It is not, however, suggested that he even exercised any such option, and without his having done so the properties were again sold in execution of the decree in Suit No. 161 of 1902 as above stated. Further, defendants Nos. 5 and 6 were undoubtedly transferees in good faith for consideration without notice of the existence of the said option, for it is not suggested that they were at all aware of the plaintiff or of his mortgage, Their rights could not, therefore, in any way have been impaired. I am of opinion that in any view of the case the plaintiff cannot possibly succeed against defendants Nos. 5 and 6. I would accordingly: dismiss the appeal with costs, one gold mohur extra being allowed for the second hearing; caused by the adjournment.

Smither, J.

2. I agree.