
(1956) 05 CAL CK 0016

Calcutta High Court

Case No: Civil Revision Case No. 3512 of 1955

Provash Chandra Basak

APPELLANT

Vs

Madalasa Devi and Others

RESPONDENT

Date of Decision: May 28, 1956

Acts Referred:

- Contract Act, 1872 - Section 200, 205, 223, 228, 43
- Transfer of Property Act, 1882 - Section 100, 3, 43, 82, 92

Citation: 60 CWN 988

Hon'ble Judges: Lahiri, J

Bench: Single Bench

Advocate: Anil Kumar Sett, for the Appellant; Samarendra Krishna Deb, Narayan Chandra Dey for Opposite Party No. 1. and Nripal Chandra Roy Chaudhury for Opposite Party No. 2, for the Respondent

Judgement

Lahiri, J.

Premises No. 96, Mechuabazar Street belonged to three persons including the petitioner Provash Chandra Basak, one Mahamaya Dasi and another person whose name does not appear from the record. On the 15th June, 1938, Sushil Chandra Sen auction-purchased 8 annas share of the premises at a sale held by the Registrar of this court, on the Original Side and obtained a sale certificate on the 5th August, 1938. Thereafter Sushil Chandra Sen obtained a decree in a suit for partition. Premises No. 96, Mechuabazar Street were divided into three lots, namely, lots Nos. 1, 2 and 3. According to the petitioner, who is the plaintiff, premises No. 96, were renumbered as premises Nos. 96A, and 96B, Mechuabazar Street. Lots Nos. 1 and 2 being comprised in premises No. 96A and lot No. 3 being comprised in premises No. 96B. According to the defendant opposite party, however, the old premises No. 96, Mechuabazar Street were divided into three separate premises, viz., new premises No. 96, new premises No. 96A and new premises No. 96B. I am not, however, concerned with that question in the present revision case. There was a direction in

the decree in the partition suit that upon the death of Mahamaya, half of her share would go to the petitioner Provash Chandra Basak and the remaining half to Sushil Chandra Sen. On the 16th January, 1945, the opposite party No. 1, Madalasa Devi purchased the interest of Sushil Chandra Sen by an indenture of conveyance. It appears that the consolidated rates due to the Corporation of Calcutta remained due from the 1st quarter of 1935-36 up to the 3rd quarter of 1940-41. On the 15th April, 1947, the Corporation of Calcutta instituted a suit on the Original Side of this court being suit No. 929 of 1947 for a declaration of charge in respect of the aforesaid arrears which amounted to Rs 2,127-11.

2. In that suit Mahamaya Dassi, the petitioner, and the opposite party No. 1 Madalasa Devi, were impleaded" as defendants. Between the 4th August, 1950 and the 6th November, 1952, the petitioner paid up all the dues of the Corporation of Calcutta together with a sum of Rs. 25 as costs. As a result of that payment the claim made by the Corporation of Calcutta was satisfied. Thereafter the petitioner instituted the suit out of which this Rule arise in the Court of Small Causes for recovery of one-third of the amount which was paid by him to the Corporation of Calcutta, in suit No. 929 of 1947. Both the courts have dismissed the plaintiff's suit, the first court dismissed it upon the ground that Madalasa having purchased from Sushil Chandra Sen on the 16th January, 1945, was not liable for the consolidated rates due to the Corporation of Calcutta from the 1st quarter of 1935-36 up to the 3rd quarter of 1940-41. On an application by the plaintiff for reference to Full Bench of the Court of Small Causes, the decree of the trial court was affirmed but on a different ground. The Bench which disposed of that application came to the conclusion that the claim of the Corporation of Calcutta in suit No. 929 of 1947 was at best a charge upon the property and as Madalasa was a bona fide purchaser for value without notice, who was not bound by the charge and therefore she was not liable for the amount. The Bench also made a further observation that the question whether Madalasa opposite party No. 1 was a purchaser for value without notice could not be gone into in the present litigation. Against the concurrent decrees of dismissal the plaintiff has obtained the present Rule from this court.

3. Mr. Sett appearing for the petitioner has contended that the Corporation of Calcutta has two kinds of rights under the Calcutta Municipal Act, against the purchaser of any land or building. Section 200 of the Calcutta Municipal Act makes the purchaser liable for the vendor's share of the consolidated rate for a period of one year prior to the date of purchase. Suit No. 929 of 1947 was instituted by the Corporation of Calcutta on the 15th April, 1947 which was more than one year from the date of purchase of Madalasa and as such Madalasa cannot be personally held liable u/s 200 of the Calcutta Municipal Act. Another right is also conferred upon the Corporation of Calcutta by section 205 of the Calcutta Municipal Act. That section makes the consolidated rate due to the Corporation of Calcutta a first charge on the premises subject to prior payment of land revenue and the period of limitation for a suit to enforce such a charge is 12 years. Therefore on the 15th April, 1947. when

the Corporation of Calcutta brought suit No. 929 of 1947 the liability of premises No. 96, Mechuabazar Street u/s 205 of the Calcutta Municipal Act was still in existence. That liability, however was in respect of one-third share of the premises owned by the petitioner, one-third of the premises owned by the predecessor in interest of opposite party No 1 and the remaining one-third in respect of that portion of the premises which was owned by Mahamaya. In these circumstances, the petitioner paid off the entire dues which constituted a charge on the entire premises. But other co-sharers were benefited to the extent that their shares of the premises were saved from an auction sale that might be held upon a decree in favour of the Corporation of Calcutta. It is true that the suit did not proceed to trial and did not terminate in a decree but the question is whether the premises No. 96, Mechuabazar Street were liable for the dues of the Corporation of Calcutta. If they were, it seems to me that the plaintiff petitioner before me is entitled to recover compensation u/s 70 of the Indian Contract Act. If, however, the share of opposite party No. 1 was not liable for the consolidated rate u/s 205 of the Calcutta Municipal Act, the plaintiff is not entitled to succeed against her.

4. Mr. Sett has relied upon a decision of this court in the case of Akshoy Kumar Banerjee v. Corporation of Calcutta (1) (19 C.W.N. 37) where Mookerjee and Beachcroft JJ. pointed out that the right of the Corporation of Calcutta u/s 200 of the Calcutta Municipal Act is entirely distinct from the right to enforce a charge u/s 205 of the Calcutta Municipal Act. In that case their Lordships had to deal with the provisions of the Calcutta Municipal Act of 1899. The provisions of that Act, corresponding to sections 200 and 205 were sections 223 and 228. Their Lordships held in that case that a bona fide purchaser for value without notice is not affected by the charge created in favour of the Corporation of Calcutta by section 228 of the old Act corresponding to section 205 of the new Act. That point, however, is quite clear from the distinction between a mortgage and a charge. It is well known that a mortgage constitutes transfer of interest but a charge does not, with the result that a transferee from a mortgagor gets the property subject to the interest on the mortgagee even if such a transferee purchases without notice of the mortgage. But the same thing cannot be said of a charge. Charge does not operate as transfer of interest in the property and a transferee of a property gets the property free from the charge provided he purchases it for value without notice of the charge. The other point that was decided by their Lordships in Akshoy Kumar Banerjee's case (1) (supra) is that it is for the purchaser to plead and prove that he is a bona fide purchaser for value without notice and they further pointed out that a purchaser of a building in Calcutta could ascertain by enquiry from the municipal authorities the arrears of consolidated rates due and he must, therefore, be in the same position as a purchaser with constructive notice of the arrears. If I apply these principles to the circumstances of this case I cannot resist the conclusion that Madalasa Devi could have ascertained the dues of the Corporation of Calcutta in respect of which the Corporation of Calcutta instituted suit No. 929 of 1947 if only she had cared to make

enquiries at the Municipal office prior to her purchase from Sushil Chandra Sen on the 16th January, 1945. The conclusion therefor follows that Madalasa was affected with constructive notice of the charge created in favour of the Corporation of Calcutta by section 205 of the Calcutta Municipal Act. The Full Bench which disposed of the application observes that Madalasa was a bona fide purchaser of the premises for value without notice. It seems to me that in coming to this conclusion the Full Bench overlooked the definition of constructive notice as given in section 3 of the Transfer of Property Act and it also overlooked the principles laid down by Mookerjee and Beach-croft JJ. in Akshoy Kumar Banerjee's case (1) (supra). The further observation made by the Bench to the effect that the question whether Madalasa was or was not a bona fide purchaser for value without notice cannot be gone into in this suit does not appear to me to be correct. If that plea was available to Madalasa in suit No. 929 of 1947 that plea was also available to her in the present suit. In the written statement, however, which was filed on her behalf in this suit, I find that she has not taken the plea that she was not liable because she was a purchaser for value without notice. When the lady did not take this plea in her written statement, I cannot see how it can be held in her favour that she was protected as being a bona fide purchaser for value without notice.

5. Mr. Deb appearing for the opposite parties has raised several points which were not raised on behalf of his Client in the court below. The first point raised by Mr. Deb is that the suit instituted by the Corporation of Calcutta for declaration of charge against premises No. 96, Mechuabazar Street was not really a suit against the said premises as they originally stood but it was a suit against new premises No. 96, Mechuabazar Street which was only one third of the original premises. Mr. Deb argues that as Madalasa had no interest in the new premises No. 96, Mechuabazar Street, she was not liable in suit No. 929 of 1947 and she is not also liable in the present suit. This contention of Mr. Deb would certainly have been fatal to the plaintiff's case if it had been the defendant's case that the suit instituted by the Corporation of Calcutta was instituted in respect of new premises No. 96, Mechuabazar Street. From the materials on the record I have not been able to find out whether as a result of the partition old premises No. 96, Mechuabazar Street were converted into three new premises as claimed by Mr. Deb or into two premises as claimed by Mr. Sett. This point was not raised by the defendant in the lower court. On the other hand, the plea taken by her in paragraph 4 of the written statement suggests that the suit instituted by the Corporation of Calcutta was in respect of the old premises No. 96, Mechuabazar Street. If that be so, I cannot allow her to raise a new question of fact for the first time in this court and I must proceed on the footing that the suit instituted by the Corporation of Calcutta was in respect of the whole of the old premises No. 96, Mechuabazar Street. I, accordingly, overrule the first point which has been raised by Mr. Deb appearing for the opposite party.

6. Mr. Deb next relied upon a decision of the Supreme Court in the case of Kedarlal Seal v. Harilal Seal (2) (1952 15 S.C.J. 37) for the proposition that the only remedy of

the plaintiff in the present case was by way of a suit u/s 82 and section 92 of the Transfer of Property Act and the suit instituted by the plaintiff is not maintainable in the Small Cause Court Mr. Deb has also invited my attention to the concluding portion of the first paragraph of section 100 of the Transfer of Property Act which lays down that all the provisions contained in the Transfer of Property Act which apply to a simple mortgage shall, so far as may be, apply to a charge.

7. The decision which is relied Upon by Mr. Deb deals with a suit which had been instituted by the plaintiff for contribution under sections 82 and 92 of the Transfer of Property Act The defendants did not deny their liability to contribute but pleaded that the extent of their liability was much less than the claim made by the plaintiff and in, aid of the plaintiff's claim reliance was placed upon section 43 of the Indian Contract Act and in repelling that contention the Supreme Court made the following observations at p. 42 :

So far as section 43 is concerned, I am not prepared to apply it unless sections 82 and 92 can be excluded. Both sections 43 and 82 deal with the question of contribution. Section 43 is a provision of the Contract Act dealing with contracts generally. Section 82 applies to mortgages. As the right to contribution here arises out of a mortgage, I am clear that section 82 must exclude section 43 because when there is a general law and a special law dealing with a particular matter, the special excludes the general.

8. This case is therefore, no authority for the proposition that a suit u/s 82 or section 92 of the Transfer of Property Act is the only remedy of a person who has satisfied a common liability. In the case before me there is no competition between section 43 of the Contract Act and sections 82 and 92 of the Transfer of Property Act as in the case before the Supreme Court. Strictly speaking, the present suit is not a suit for contribution at all but a suit for compensation u/s 70 of the Indian Contract Act. The plaintiff's case is that he paid off the entire dues in respect of premises No. 96, Meehuabazar Street and thereby the co-sharers of the plaintiff enjoyed a benefit by preventing an auction sale of their shares of the premises, and consequently under the plain provisions of section 70 they are liable to make compensation to the plaintiff. The right to claim compensation u/s 70 is an equitable right which arises out of an implied contract of indemnity between persons whose interest in the property is liable for a common debt As I have already said at the time when the plaintiff made the payment during the pendency of suit No. 929 of 1947 the whole of premises No. 96, Mechuabazar Street were liable for the statutory charge created in favour of the Corporation of Calcutta by section 205 of the Calcutta Municipal Act. I, therefore, see no reason why the plaintiff cannot make the defendant No. 1 liable for her share of the dues.

9. Mr. Deb next relied upon a decision of this court in the case of Bibhuti Bhusan Majumdar v. Maj(sic)ar Rahman (3) (I.L.R. 61 Gal. 956) for the proposition that when a building within the Municipality of Calcutta is sold by the Registrar of this court on

the Original Side, the purchaser gets the property free from all incumbrances including all statutory charges. In that case the conditions of sale held by the Registrar contained the following provisions :

The purchaser shall nor be liable to pay the outgoings previous to the date of payment of the purchase money." The notification of; ale also did not mention the statutory charge which the Corporation of Calcutta had for its dues Under these conditions the property was sold by the Registrar and Costello and Lort Williams JJ. held that in these circumstances the purchaser of the property at the sale held at the instance of the mortgagee decree-holder could not deduct the dues of the Corporation of Calcutta from the price which he had paid for the property. In other words their Lordships held that as between the mortgagee decree-holder and the auction-purchaser the liability of the property to pay the dues of the Corporation is upon the property in the hands of the purchaser, because the property is purported to be sold free from incumbrances. This case does not lay down the proposition for which it was cited namely, that the statutory charge in favour of the Corporation of Calcutta is wiped out as soon as the property is sold by the Registrar, Original Side. The conditions of sale under which Sushil Chandra Sen purchased the property in the present case have not been produced nor has this point been raised in any of the courts below. Nor do I know the circumstances under which the property was sold by the Registrar. All that I get from the Indenture of Sale by Sushil Chandra Sen to Madalasa is that Sushil Chandra Sen was a purchaser at an auction sale. Even if I assume that the conditions of sale at which Sushil Chandra Sen purchased were the same as the conditions in Bibhuti Bhusan Majumdar"s case, all that I can say is that the dues of the Corporation of Calcutta should be realised from the premises in the hands of the action-purchaser, Sushil Chandra Sen. If that be so, I do not see any reason for holding that Sushil. Chandra Sen purchased the property free from all incumbrances including the statutory charge in favour of the Corporation of Calcutta.

10. Mr. Deb also cited another decision by a Division Bench of this court for the proposition that a suit of this description does not come either u/s 69 or u/s 70 of the Indian Contract Act. The decision relied upon by Mr. Deb is the decision in the case of Biraj Krishna. Mukherjee v. Purna Chandra Trivedi (4) [I.L.R. (1939) 2 Cal. 226] (Henderson and Latifur Rahman, JJ.). Mr. Deb relied upon a passage at p. 232 which is to the following effect :--

There remains the applicability of section 70. I am unable to say that this can have any application. The plaintiff was personally liable for the whole of the patni rent. When he paid it, he was doing so primarily on his own behalf. On the other hand the appellant was not liable at all. As the plaintiff was himself personally liable, no question of acting on behalf of the appellant or of acting gratuitously can possibly arise. Any benefit which the appellant might derive from the payment would be purely subsidiary to the benefit which the plaintiff was conferring upon himself.

11. In the case before me, however, the plaintiff was liable to pay only for his share of the premises whereas opposite party No. 1 or her predecessor in interest was liable for her or his share of the interest in premises No. 96, Mechuabazar Street. In the case before me it cannot be said that when the plaintiff was making the payment, he was doing so primarily on his own behalf. What he was doing at the time of satisfying the claim was to save his own interest as well as the interest of the co-sharers who were liable equally to the plaintiff. In these circumstances, I do not see how the principles laid down by Mr Justice Henderson in the aforesaid decision can help the opposite party in the present case.

12. For the reasons given above. I make this Rule absolute, set aside the judgments and decrees made by the courts below and decree the plaintiff's suit with costs in all the courts, the hearing fee in this court being assessed at two gold mohurs.

13. The Corporation of Calcutta was also impleaded as a defendant in this suit and it has also been impleaded as opposite party No. 2 in the present Revision case. As far as I can see, no relief was or could be claimed against the Corporation of Calcutta and as such it was absolutely unnecessary for it to enter appearance. The Rule is discharged so far as opposite party No. 2 is concerned. But I do not see why I should pay costs to a party who enters appearance only for the purpose of earning costs. In the result the Rule is made absolute with costs, hearing fee being assessed at two gold mhours as against opposite party No. 1, and it is discharged so far as opposite party No. 2 is concerned without costs.