

(1960) 03 CAL CK 0026

Calcutta High Court

Case No: Appeal from Appellate Order No. 70 of 1959

Tulsi Charan Surul

APPELLANT

Vs

Kangali Charan Dey and Another

RESPONDENT

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**Date of Decision:** March 25, 1960**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 18, 37, 38, 47

**Citation:** 64 CWN 539**Hon'ble Judges:** Sen, J; N.K. Sen, J**Bench:** Division Bench**Advocate:** Hem Chandra Dhar, Provas Chandra Basu and Bishnu Lal Kanodia, for the Appellant; Dhruba Kumar Mukherjee, for the Respondent**Final Decision:** Dismissed

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### Judgement

Sen, J.

This appeal is by the judgment-debtor against an appellate order upholding the order of the learned Subordinate Judge, 1st Court, Hooghly, dismissing an objection u/s 47 of the CPC to the execution of grosses copy of a notarial mortgage deed as a mortgage decree in the Court of the Subordinate Judge. The case arises from Chandernagore which until its defacto transfer to India on the 2nd May, 1950, was governed by the French Laws. A decret, corresponding to an Ordinance or Regulation in India, was promulgated by the Governor of French India on November 23, 1887, regarding the organisation of the profession of notaries. A notary or notaire was defined as a public officer appointed to take charge of deeds and contracts which had to be clothed with the character of the authenticity; the party was to deposit the original deed before the notary and could obtain an authenticated copy known as the grosses copy. In respect of a mortgage bond deposited with a notary the grosses copy delivered to the party was made out in an executory form, in the same terms as a judgment of Court of Justice. Such a grosses copy of a mortgage bond could be executed as a decree of the Court, if the

mortgagor did not pay up the mortgage dues within the stipulated time mentioned in the deed of mortgage, this being provided by article 545 Of the French Civil Procedure Code. Under the Chandernagore (Application of Laws) Order, 1950, such laws in force in Chandernagore immediately before the commencement of the Order (i.e. immediately before the 2nd May. 1950) as corresponded to the enactments mentioned in the schedule to the Order ceased to have effect save as respects things done or omitted to be done before the commencement of the Order. In the schedule to the Order were included the Bengal, Agra and Assam Civil Courts Act, 1887, the Code of Civil Procedure, 1908, the Indian Evidence Act, 1872 and certain other Acts like the Indian Penal Code, the Code of Criminal Procedure, the General Clauses Act etc. Accordingly, with effect from 2nd May, 1950, Civil Courts under the Bengal, Agra and Assam Civil Courts Act were set up and they were governed by the CPC and the Indian Evidence Act; and the French CPC and any other corresponding law ceased to be applicable.

2. There was de jure transfer of Chandernagore to India with effect from 9th June, 1952, by a treaty between the French and Indian Governments, and the Chandernagore (Administration) Regulation, 1952, which was published in the Gazette of India on 30th June, brought about certain changes in the law with section 11 of the Regulation, the Central Government was empowered to extend and did extend certain further Indian Acts to Chandernagore and repealed the corresponding law in force in Chandernagore. Law in force in Chandernagore was made uniform with that in the rest of West Bengal by the Chandernagore (Merger) Act, 1954 and the Chandernagore (Assimilation of Laws) Act, 1955, the first one being a Central Act and the second one being a West Bengal Act

3. This gradual transformation of the laws in force in Chandernagore naturally led to some confusion from time to time, and litigants naturally have sought to take advantage of the confusion.

4. The facts of the present case are briefly as follows:--One Kanailal Surul with his son Tulsi Charan Surul and his brother's widow Nalini Bala Dassi borrowed Rs. 4000/- from Kangali Charan Dey on 5th December, 1947, and in consideration of sum of Rs. 4000/- obtained in cash and the sums of Rs. 700/- and Rs. 1300/- respectively covered by two previous notarial mortgage bonds, a fresh notarial bond was executed by Kanailal Surul, Tulsi Charan Surul and Nalinibala Dassi and a notary of Chandernagore delivered gross copy of the notarial mortgage bond dated 5th December. 1947 to the mortgagee Kangali Charan Dey. The mortgage property consisted of two items viz., 2 cottahs out of plot No. 694 and 1.48 centiares out of C.S. plot No. 695 of Chandernagore. There was a charge on the second item of property on account of maintenance of one Jasodamoni. By an agreement executed between Jasodamoni and Kangali Charan Dey on 16th January, 1948, Jasodamoni relinquished her charge for maintenance in respect of the second item of property and Kangali Charan Dey on his part reduced the rate of interest stipulated on the

principal of the mortgage from 8 p.c. to 6 p.c. Out of principal amount Rs. 6000/- only Rs 1000/- was paid within the stipulated period of 6 years. One of the mortgagors Kanailal Surul being dead, the mortgagee Kangali Charan Dey started the present execution case against the mortgagors Tulsi Charan Surul and Nalinibala Dassi on 16th September, 1957 treating the grosses copy of the notarial mortgage as a decree. There upon, one of the judgment-debtors viz., Tulsi Charan Surul. who is appellant before us, filed an objection u/s 47 of the CPC taking various objections to the maintainability of the execution application. The application was dismissed by the learned Subordinate Judge, and the judgment-debtor preferred an appeal which was heard by the Additional District Judge, Hooghly. The learned Additional District Judge also dismissed the appeal, holding that the objections were not maintainable. Accordingly, the judgment-debtor has preferred this Second Miscellaneous Appeal.

5. The first point urged by Mr. Dhar appearing for the appellant, is that the notarial mortgage bond of 5th December, 1947 was replaced by a fresh bond on 16th January, 1948, when Jasodamoni who had a charge on one of the items of mortgaged property relinquished her charge and the mortgagee on his side agreed to reduce the rate of interest from 8 p.c. to 6 p.c.; and as this bond of 16th January, 1948 was not a notarial bond of which a grosses copy had been obtained and the original mortgage bond had been replaced by this bond of 16th January, 1948, there could be no execution of the grosses copy of the notarial mortgage bond of 5th December, 1947.

6. We must hold however, there is no substance in this objection. The notarial mortgage bond was the bond of 5th December, 1947. Ext. A, the bond or agreement dated 16th January, 1948 was by no means a mortgage bond, but merely an agreement between Kangali Charan Dey and Jasodamoni by which Jasodamoni relinquished her charge on one item of mortgaged property and Kangali Charan Dey on his side agreed to reduce the rate of interest on the principal of the mortgage from 8 p.c to 6 p.c. This agreement by no means took place of the mortgage bond, although the mortgagors could get the advantage of this agreement to reduce the interest payable by them. This objection must, therefore, fail.

7. The next objection raised by Mr. Dhar is that the grosses copy of a notarial mortgage bond is not a decree within the meaning of the CPC and cannot therefore be executed as the decree under the CPC and that it is necessary that the mortgagee should file a suit for enforcing the mortgage and obtain a preliminary mortgage decree and a final mortgage decree, before he can put the decree into execution and proceed to sell the mortgaged property.

8. It has already been stated that under the French Law a notary was required to deliver a grosses copy of a mortgage bond executed and filed before him, and this grosses copy of a notarial mortgage bond was delivered in executory form, and by

article 545 of the French Civil Procedure Code, such a grosses copy in executory form could be executed as a decree. Accordingly, so long as the French Laws were in force in Chandernagore, the holder of a grosses copy of a notarial mortgage bond could straight-away put the same into execution in accordance with the procedure laid down in the French Civil Procedure Code, without having to file a mortgage suit for the enforcement of the mortgage in the first instance. In the case before us the mortgagee obtained his grosses copy of the notarial mortgage bond on or shortly after 25th February, 1948. The mortgage bond was executed on 5th December, 1947, but the grosses copy which was filed along with application for execution is dated 25th February, 1948. This was long before the transfer of Chandernagore to India, and therefore, as soon as the mortgagee obtained this grosses copy of the notarial mortgage bond, he obtained a right to execute it without having to file a separate suit for enforcement of the mortgage. On 2-5-1950 the date on which the transfer of territory took place, the French CPC and other French Laws corresponding to the enactments mentioned in the schedule of the Chandernagore (Application of Laws) Order, 1950 came to be repealed, but the existing rights were not taken away. By section 18 of the Chandernagore (Merger) Act, 1954 all the laws in force in Chandernagore which had not already been superseded, were repealed, but it was provided by subsection (12) of section 18 that this would not affect previous operation of any such laws, or any right, privilege, obligation or liability acquired, accrued or incurred under any such law, or any legal proceeding or remedy in respect of such right, privilege, obligation, liability etc. Similarly, the Chandernagore (Application of Laws) Order of 1950 did not take away the previous operation of the French Laws or any right, privilege, obligation or liability acquired, accrued or incurred. In the circumstances, where the mortgagee had before 2nd May, 1950, acquired the right to put a grosses copy of a notarial mortgage bond into execution without having to file a separate suit for the enforcement of the mortgage, the mortgagee could not be deemed to have lost that right, even though the right was sought to be enforced in 1957, after the period of payment provided in the mortgage bond had expired.

9. Under the French Law, when a grosses copy of mortgage bond was put into execution, a copy of the mortgage deed had first to be served on the debtor, and then a "commandement" had to be issued on the debtor calling upon him to pay up the principal with interest within the date mentioned in the commandement. Thereafter, the creditor could proceed to attach the mortgaged property and put it to sale after issue of "cashier de charges" or booklet containing the conditions for sale. Mr. Dhar has urged that if the grosses copy of the notarial mortgage bond be sought to be executed as a decree, the French Procedure must be followed viz., there should be service of a copy of the mortgage bond on the mortgagors to appear and make the payment of the principal amount together with interest by a date fixed in the commandement, and that unless this procedure is followed the grosses copy of the mortgage bond cannot be executed. In this connection Mr. Dhar

has referred to an unreported decision by a Division Bench of this Court viz., *Sm. Bhanumati Dassi v. Gour Mohan Sett* (1) (F.M.A. 153 of 1953, decided on 23rd August, 1955). This was the judgment of Guha Ray, J. and myself, and in the course of the judgment an observation was made by me that a grosses copy of a notarial mortgage deed, while it is not strictly speaking a decree of competent Court, has the force of a decree and can be executed as a decree after the service of a copy of the mortgage deed on the debtor and after issue of the commandment calling upon the debtor to pay up the debt with interest accrued within a date fixed. Mr. Dhar has sought to take advantage of this observation and argued that until the service of the copy of the mortgage deed on the debtor and issue of a commandment calling upon the debtor to pay up the amount due within a fixed date the grosses copy could not be executed as a decree. I may point out, however, that Guha Ray, J., who delivered a separate judgment, observed that a grosses copy of a notarial mortgage deed, if not a decree, had the force or effect of a decree; he did not add that any further action was necessary to give it the force of a decree. I may point out further that in another part of my judgment in the above case, it was observed that a grosses copy of notarial bond has the force of a decree and could be executed by the Civil Court set up under the Bengal, Agra and Assam Civil Courts Act. The net result of the two concurrent judgments was to lay down the principle that a grosses copy of a notarial mortgage deed could be executed as a decree. In this connection reference has also to be made to another decision viz., *GOUT Mohan Sett v. Gokul Chandra Chatterjee* (2) (F.M.A. 50 of 1953, decision by S.R. Das Gupta and Mallick, JJ. dated 20th January, 1955). In that case, it was held on the concession of both the parties that a grosses copy of a notarial mortgage bond had the force of a decree of a competent Court and could be executed as such. I may also refer to a subsequent decision *Saurendra Kumar Saha v. Bibhuti Roy*, (3) a decision of Guha and Banerjee, JJ. ( [Sourindra Kumar Saha Vs. Bibhuti Roy and Another,](#) ). In that case it was also held that the grosses copy of a notarial mortgage bond has the force of a decree and may be executed as such under the provisions of the Civil Procedure Code.

10. Mr. Dhar has criticised the decision in *Saurendra Kumar Saha v. Bibhuti Roy*. (3), I must agree that the decision appears to go too far, as when it holds that even a grosses copy of a notarial mortgage bond executed after and May, 1950, and before 2nd October, 1954, when the Chandernagore (Merger) Act, 1954 came into force, could be executed as a decree, without the creditor having to file a mortgage suit and obtain a mortgage decree under the provisions of Order 34 of the Civil Procedure Code. In consideration of the steps by which the French Laws of Chandernagore were replaced by the laws in force in the rest of India, particularly West Bengal, I am of the opinion that after the 2nd May, 1950, the procedure by which a notary working under the decret of 1887 could grant a grosses copy in executory form of a notarial mortgage deed ceased to be effective. The executory formula began with the words "French Republic: In the name of the French People". It appears to me that after the de facto merger of Chandernagore with India, and

still more after the de jure merger of Chandernagore with India, it could not be possible for a notary to inscribe the executory formula as above. Until the Indian Registration Act was extended to Chandernagore, it would be still the duty of the notary to receive the documents which required to be attested and authenticated, and therefore a mortgage deed could be made and deposited before the notary until the Chandernagore (Merger) Act, 1954, came into force; but that does not mean that the notary could still have the power to deliver grosses copies in an executory form or that grosses copies even if delivered could be executed straightaway under the provisions of section 545 of the French CPC which had ceased to have force as from 2nd May, 1950.

11. The matter can be looked at from another standpoint. The Chandernagore (Assimilation of Laws) Order, 1950 introduced the CPC and several other Acts and Codes, and corresponding laws were superseded. In relation to the Civil Procedure Code, the corresponding law would mean not merely the French Civil Procedure Code, but the decret of 1887 in so far as it authorised a notary to deliver grosses copies of mortgage bonds in executory form, because Order 34 of the CPC would henceforth govern all mortgages and the provisions as to issue of grosses copies in executory form were inconsistent with Order 34 of the Civil Procedure Code. Hence I would hold that grosses copies of notarial mortgage deeds delivered between 2nd May, 1950 and 2nd October, 1954 would only have the force of certified copies of mortgage bonds, but would not be executable as decrees. But until 1st May, 1950, when the French laws were in force, grosses copies of notarial mortgage deeds in executory form had the force of decrees, and holders of such copies are still entitled to execute them as decrees, subject to any law of limitation.

12. It is not necessary for us however to make a reference to a larger bench for a decision of the question, because in the present case we are concerned with a grosse copy of a notarial mortgage bond which was executed on 5th December, 1947 and delivered on 25th February, 1948. Both the dates being long before the 2nd May, 1950, it is clear that the creditor had the right under the French Laws to execute the grosse copy of the mortgage bond as if it had the force of decree, and that right was not taken away by the enactments by which the French Laws were gradually replaced by the Indian Laws in Chandernagore. Therefore, we agree with the finding of the Court below that the grosse copy of the notarial mortgage bond in favour of the creditor could be put into execution by him without the creditor having to file in the first instance a mortgage suit. This objection therefore must fail.

13. The last objection urged by Mr. Dhar is that the learned Subordinate Judge of Hooghly had no jurisdiction to entertain the application for execution of the grosse copy of the notarial mortgage deed, because u/s 38 of the CPC a decree may be executed either by the court which passed it or the court to which it is sent for execution, and the learned Subordinate Judge neither made the grosse copy of the notarial mortgage bond nor was it sent to him for execution. But there is section 37

of the CPC which provides that where the court of first instance which passed a decree has ceased to exist, the court which would have jurisdiction to pass such a decree on the relevant date must be deemed to be the court which passed the decree. At the time when the grosse copy of the notarial mortgage deed was presented for execution, the power of the notary to deliver a grosse copy had ceased, but a decree in respect of such a mortgage could be passed by the Court of the learned Subordinate Judge. Therefore, we must hold that the Court of the learned Subordinate Judge had jurisdiction to entertain the application for execution and to maintain the same.

14. Thus, we find there is no substance in the appeal. It is, therefore, ordered the appeal be dismissed with costs. Hearing fee is assessed at 3 g. ms.

N.K. SEN, J.

I agree.