
(1872) 08 CAL CK 0015

Calcutta High Court

Case No: None

Neerunjun Mookerjee

APPELLANT

Vs

Oopendro Narain Deb

RESPONDENT

Date of Decision: Aug. 23, 1872

Judgement

Markby, J.

This is an application made by the plaintiff to obtain execution of a decree by sale of the equity of redemption of certain property of which he is the mortgagee, the decree which he seeks to execute having been obtained in respect of the mortgage-debt in a suit which asked in the alternative for a decree for foreclosure or sale. He has made, other ineffectual attempts to realise his money, and has now come back on his original decree. The decree is in the usual form of money-decrees, but at the end of it is this note, which is described as a note in the decree: "The equity of redemption in the property comprised in the mortgage is not liable to attachment and sale under this decree." Now, the first objection taken on the part of the defendant is, that, quite independent of that note, as a rule of law governing this Court, the equity of redemption is not saleable upon a money-decree obtained by a mortgagee in respect of his mortgage-debt. I think that that contention must be considered by me as disposed of, for the purposes of this case at least, by the observations of Peacock, C.J., in the appeal case of Ramlochun Sirkar v. Sreemutty Kaminee Debee Ante; p. 60, to which reference has been made. I sat with the Chief Justice in that case, and whether or no that particular observation of the Chief Justice was assented to by me does not appear, but at any rate I should act upon it for the purposes of this case. It was a considered observation, and is not at variance with any decided case. The Chief Justice distinctly says, after noticing that the property which the mortgagee sought to sell was the equity of redemption, that it is discretionary with the Court to grant or refuse the sale. Then it was objected by Mr. Kennedy that, whether that be so or not, the note which I have read is an absolute prohibition so far as this case is concerned, against the sale of the equity of redemption in execution. In his argument he seemed disposed to put it so high as an undertaking on the part of the plaintiff not to proceed against the mortgaged property, or at any rate as a consent by the plaintiff to

that. I don't think I can treat it as that. It does not appear that the Court, at the time the case was before it, in any way intimated that that undertaking should be required; and the mere fact that the minutes of the decree" were shown to the plaintiff's attorney, and assented to by him, does not imply any consent to the terms of the decree, but merely that the decree is drawn up as it ought to be drawn up with reference to the judgment of the Court; and it leaves the question as to the true construction of the note still open. I had some doubt during the argument upon that point. It seems to me, however, that the proper construction to put on it is that it does leave some discretion to the Court. The opinion which I have expressed upon the first point, I think, assists us to come" to a conclusion on this point also. If it is discretionary with the Court, as the late Chief Justice says it is, either to grant or refuse execution by attachment and sale of the equity of redemption, it certainly would be strange if the Court, when granting the original decree, were absolutely to take that discretion away from the Judges who might be called on to execute" the decree. The meaning of the late Chief Justice must be that in some cases it would be proper to execute the decree in that form, and in other cases not. The Court, at the time it passed this decree, had not, and could not have had, the circumstances before it which would enable it to say how that discretion should be exercised. It therefore seems to me that it would be improper for the Court to do that which amounted to taking away a discretion, which by law, according to the case which has been referred to, does exist. I think, therefore, that the more reasonable construction to put upon this clause is that contended for by Mr. Woodroffe, viz., that it was only meant as a guide to the Court which should have to execute the decree; and that, in this case, execution was not to issue against the equity of redemption as a matter of course, but only subject to the appeal order of the Court.

2. Then comes the question how this discretion should be exercised in this case. It is said that there was something in the nature of bad faith on the part of the plaintiff in asking for a decree in this form. When Mr. Kennedy referred to his client's affidavit, the decision in *Courjon v. Courjon* 9 B.L.R., App., 10 was not before me: but without deciding whether that affidavit can be read or no, I consider that there is nothing in it to show why execution should be refused. The only ground stated is that the plaintiff had some idea of escaping the ordinary results of a decree for foreclosure or sale by getting a money-decree. I do not think it is reasonable to conclude that; because the plaintiff, or the persons who were advising him, must have known what extreme difficulty there is in this Court for a mortgagee to obtain execution on a money-decree against the mortgaged property, I think I ought not, even if I look at the affidavit, to give any weight to it--the more so as the plaintiff has had no opportunity of denying the statement. The next point is whether I should order execution simpliciter by attachment and sale of the mortgaged property, or take the course which has been proposed by the plaintiff. Mr. Woodroffe very fairly admits that the defendant ought not to be put into any worse position than if a decree for sale had been originally passed. I think the defendant should be put in the same position as if a decree for sale had passed in the first instance, with this exception, that instead of there being a direction for an account to be taken in the usual way, the account should be

treated as a final account at the time of the decree; the plaintiff to be entitled to no more than 6 percent interest from decree. On the other hand, I see no reason why the entire period of six months should now be allowed. There will be an order for sale in the terms of an ordinary decree for Bale within four months, from this date, with provision for the balance, if any, unrealized by the sale. I make no order as to the costs of this application; The plaintiff will have liberty to bid at the sale.

(¹) 9 B.L.R., App., 10. [It should have been stated in the report of that case that there also the hearing had been adjourned for Mr. Kennedy's conveyance and that the affidavit which he sought to read had been filed after such adjournment.]

(²) Before Sir Barnes Peacock, Kt., Chief Justice, and Mr. Justice Markby.

The 22nd May 1868.

Ramlochun Sirkar (Plaintiff) V. S.M. Kamineedebee (Defendant).

Appeal from the judgment of Norman, J., dated 26th September 1867 5 B.L.R., 460, in foot-note.

The Advocate-General for the appellant.

Mr. Kennedy for the respondent.

The judgment of the Court was delivered by.

Peacock, C.J.--The Court, at the conclusion of the argument yesterday, intimated its opinion upon the main question raised before us, viz., whether the injunction restraining the plaintiff from proceeding to a sale of the right, title, and interest of the defendant, under the decree of this Court of the 28th July 1862, until further orders, ought to be set aside. The learned Judge who made the order of the 4th of July also issued the order for the injunction.

The order is to restrain the appellant from further proceeding under the order of sale and the decree made in the cause. It has been argued that the effect of it is to restrain the plaintiff not only from proceeding to sell under the order of the 4th July 1867, but also from proceeding under the decree of the 25th September 1865; and it was contended that the Court had no jurisdiction to restrain the plaintiff from proceeding under the decree without a suit to set aside the decree. It is now admitted, on the part of the defendant, that the injunction was not intended, to restrain the plaintiff from taking proceedings under the decree, and therefore we will treat it as if it clearly expressed, what I think it did express, viz., that it was intended merely to restrain proceedings under the order of the 4th July. It is quite clear that the Court had power by order to stay proceedings under the order of the 4th July 1867 without a suit for that purpose, and if it could restrain the proceedings by an order, it might do so by an order for injunction without a suit, and we ought not to reverse

that order upon a mere matter of form.

That brings us to the question whether there are sufficient grounds for restraining further proceedings under the order of the 4th July. It is an order to sell the right, title, and interest of the defendant under a decree of this Court. The interest in that decree had been mortgaged to the plaintiff by a deed dated the 28th October 1859. By that deed the right, title and interest of the defendant in the property, which was the subject of the suit, and in the decree for account which had been obtained, and in all decrees which should be obtained in that suit subsequent thereto, were mortgaged to the present plaintiff; so that what the plaintiff wishes to be sold is merely an equity of redemption in the decree of 1862.

It is unnecessary to determine whether the Court, in the exercise of a sound discretion, would have allowed the plaintiff to sell the interest of the defendant in that decree, if there had been no mortgage. I think it clear that the Court ought not to allow a mere equity of redemption in that decree to be sold. There can be no doubt that, if that equity of redemption were exposed to sale, and the plaintiff were to give notice in the auction-room of his mortgage, the equity of redemption would sell for nothing; and the Court ought not, in my opinion to allow the defendant's interest to be jeopardized by allowing the plaintiff to proceed to sell the equity of redemption. Under these circumstances, it appears to me now, as it appeared to me yesterday, that the learned Judge was right in ordering the injunction, and that order ought to be affirmed.

I was doubtful yesterday whether it ought to be affirmed with costs or not. I must confess that, looking to the affidavit of Mr. Gillanders that he himself in one case, and he and his partner in another, had obtained two decrees against the defendant for large amounts, and that it had been mutually agreed between him and the plaintiff that neither of them should execute their decrees against the defendant, but that they should both wait for payment of their respective demands under the decree of the 28th July 1862;--looking to that fact, and further looking to the fact that negotiations were going on between Mr. Gillanders and the plaintiff up to the 20th of August for the purpose of preventing the plaintiff from proceeding to sell on the 22nd of August under the order of the 4th of July, I did think that the application for the injunction, which was made in consequence of the representation made by the defendant in person to Norman, J., on the 22nd of August was made not for the purpose of protecting the interests of the defendant, but for the purpose of protecting those of Mr. Gillanders. If it had appeared that this application was made substantially by Mr. Gillanders for his own benefit, and not upon the retainer of the defendant, I should have thought that the order ought to be affirmed without costs. We, therefore, gave Mr. Gillanders an opportunity of making an affidavit, or of being examined viva voce, as to the circumstances under which the application for injunction was made. The examination and cross-examination have gone very far beyond that point: but as Mr. Gillanders is an attorney of this Court, I was anxious that he might set his character clear with re-reference to his conduct in the suit in which the decree of 1862 was pronounced, as well as in that in which the present order was made. I did not think it right therefore to

stop the examination. The evidence which has been given is not sufficient to enable me to express any opinion upon many of the subjects which have been brought forward; nor can I say whether the arrangement which Mr. Gillanders was anxious to bring about with Ramlochun Sirkar was for the interests of the defendant. It is not necessary for me to express any opinion on those points. I do not see anything sufficient to enable me to say that Mr. Gillanders was violating his duty towards his client. There is one matter however upon which, I think, Mr. Gillanders acted very improperly; and that was in taking an *ijra* from the Receiver of this Court of property which was the subject-matter of a suit in which he was acting as solicitor for one of the parties. That *ijra* was not taken openly in his own name, but in the name of a clerk or cashier in his office. Mr. Gillanders states that he did mention to one of the clerks of the Receiver that he was the person beneficially interested in the *ijra* but it does not appear that he mentioned that fact to the Receiver himself, or that the Receiver was aware of it from first to last. Mr. Gillanders states that it was a condition that the Receiver was not to put the *ijra* into possession; that he had to bring a suit in the *mofussil* to obtain possession; that he obtained a decree, which was afterwards reversed in the High Court; that, in consequence, he never got possession of the property and that he had to pay three years' rent at the rate of Rs. 2,530 a year, in addition to the costs of the suit which he instituted. He shares positively that all these moneys were paid by himself: that he has not been repaid the amounts; and that he has no claim against any one in respect of them. Still the course which he adopted in taking that *ijra* is not the less objectionable. Upon the main question, Mr. Gillanders has satisfied me that the application which the defendant made to the Court on the 22nd August 1867 was not made at his instance; that he had advised her brother and her mooktear that, in his opinion, an application of the kind would not succeed; and that they then stated that they would make it themselves. He says that they asked him to allow a clerk in his office to make a copy of an English petition which they had got, and that he gave his consent. He says that after the application to Norman J., he was sent for by the Judge as being the attorney of the defendant Kaminee, that she was in Court at the time he arrived; and that Norman J., asked the lady if she had any attorney, and that she said Mr. Gillanders was her attorney, and he accordingly undertook the proceedings in the matter. I, therefore, look upon this substantially as an application made on behalf of the defendant. Under these circumstances she is liable to her attorney for the costs in this matter, and I, therefore, think that the ordinary rule should be followed, and that the order being affirmed, it ought to be affirmed with costs. The order, however will be modified by striking out the words "and in the decree made in the same, dated the 21st day of September, 1865."

It is true that the defendant endeavors to impeach the judgment of 1865, and she charges that the plaintiff did induce her not to set up any defence to that action; but her application did not rest upon that ground alone,--it rested also upon the ground that, if the plaintiff were allowed to proceed to sell her rights and interests in that decree, it would be highly injurious to her interests, and it appears on the affidavits in the case that the order of 4th July 1867 was obtained by the plaintiff without his bringing to the notice of the Court that

the interest which he was about to sell was merely an equity of redemption in the decree. It was discretionary in the Court to order a sale or not; and if all the facts had been brought to the notice of the Court. I think it would not have ordered a sale of the equity of redemption in the decree. I do not think that the defendant, under the circumstances of the case, ought, to be deprived of her costs of this appeal upon the ground of her having endeavored to impeach the judgment of 1865.

It is not necessary to decide this question upon any other grounds than those I have mentioned. I, however, think it right to mention that, in my opinion, there is very great doubt, whether, in the present case, the prohibitory order of the 19th June 1867 was correct. It is clear that the right, title, and interest of the defendant in the decree of 1862 was not a mere debt. The decree declared her right in immoveable property, some of which at least was not of the local limits of the ordinary original jurisdiction of this Court. The Sheriff, under a writ of execution from this Court, could not have attached the interest which the decree declared the defendant to have in the property in the 24-Pergunnahs. The prohibitory order is merely in the nature of an injunction to her, which possibly might have been issued against her as being in the jurisdiction of this Court, commanding her not to alienate her interests under the decree of 1862. It appears to me that it was not an execution. If it was merely an injunction and not an execution, there was no authority for limiting the order of sale of 4th July 1867. Act. VIII of 1859, s. 221, enacts, "that when all the necessary preliminary measures have been taken, where any such are required, the Court, unless it see cause to the contrary, shall issue the proper warrants for the execution of the decree." The Act proceeds in a 223: "If the decree be for a house, land, or other immoveable property, in the occupancy of a defendant or of some person on his behalf, or of some person claiming under a title created by the defendant subsequently to the institution of the suit, the Court shall order delivery thereof to be made, &c;" and so with regard to properties of other descriptions; so that for an attachment it is necessary that a writ or a warrant should issue.

With reference to the jurisdiction of this Court, it is directed by the Charter that all writs issued out of the Court should issue in the name of the Queen; and an order of this sort restraining the defendant from alienating under the decree, though served by the Sheriff on the defendant at her own house, was not a writ of execution. As an order of injunction restraining her from alienating her equity of redemption, it might be served on the defendant within the jurisdiction of this Court, and it was served, by fixing it on the outer door of her dwelling-house; but if it was an execution against the interest which the defendant was by the decree declared to have in the immoveable property, it ought to have been attached by a notice fixed on the property itself, the subject-matter of the execution, and that could not have been done by the Sheriff, because it was beyond the jurisdiction of this Court. It could have been done only by an officer of the Court of the 24-Pergunnahs where the land was situate under an execution of the decree of this Court upon its being sent there for execution under the provisions of Act VIII of 1859 s. 284, and the following sections ^(a).

(a). A report of the judgments on appeal in the case of Troyluckmohun Tagore Gobind Chunder Sen, referred to by Norman, J., in his judgment in this case, will be found in the Englishman Newspaper of the 17th February 1863. There are notes only of the judgments in the Registrar's office.