
(1870) 02 CAL CK 0031

Calcutta High Court

Case No: Appeal No. 12

Roy Nandipat Mahata

APPELLANT

Vs

Alexander Shaw
Urquhart

RESPONDENT

Date of Decision: Feb. 23, 1870

Judgement

Norman, J.

The first question arises on a preliminary objection by Mr. Cowell on the part of the respondent. He contended that by section 257, if the objection be disallowed, and an order is made confirming the sale, an appeal lies, but the order passed on the appeal is final. Mr. Cowell, referring to that section, contended that the order of Mr. Justice Kemp, which was a binding judgment according to the provisions of the 15th section of the Charter of 1865, was an order passed on appeal, and therefore final under the provisions of the 257th section of Act VIII of 1859. We are of opinion that that objection cannot prevail. Before the Charter of 1865, if, in a Court consisting of only two Judges, there was a difference of opinion upon a point of law, it was provided by section 23 of Act XXIII of 1861 that the Judges should state the point on which they differed, and the case would have been re-argued on that question before one or more of the other Judges, and would have been determined according to the opinion of the majority of the Judges by whom the appeal was heard. Act VIII of 1859 and the amending Act, XXIII of 1861, are Acts to simplify the procedure of Courts of Judicature not established by Royal Charter. Those Acts were put in force as regulating the practice of this Court by the 37th section of the Charter of 1862. The Charter of 1862 expired at the end of 1865, and by the 37th section of the Charter of 1865, it was provided that it shall be lawful for the High Court, from time to time, to make rules and orders for the purpose of regulating all proceedings in civil cases which may be brought before it, provided always that the said High Court shall be guided in making such rules and orders, as far as possible, by the provisions of the Code of Civil Procedure, being an Act passed by the Governor General in Council, and being Act No. VIII of 1859, and the provisions of any law which has been made, amending or altering the same, by competent legislative authority for India." By certain rules which

were passed by the Court on the 28th of December 1865, it was ordered that all "proceedings in civil cases, which shall be brought before the Court (except those in the admiralty, vice-admiralty, testamentary, and intestate jurisdictions) shall be regulated by Act VIII of 1859 and Act XXIII of 1861, and by such other Acts and by such rules and orders of the High Court as were in force and regulated the procedure of the said Court at the time of the publication of the said Letters Patent, "except so far as the same are at variance with the provisions of the said Letters Patent." Now the provisions of section 23 of Act XXIII of 1861 are at variance with the provisions of section 36 of the Charter of 1865; and, consequently, instead of a reference and a re-argument, where two Judges differ, before one or more other Judges, the practice u/s 36 is that the judgment of the senior Judge prevails, subject however to the provision of section 15, that whenever two or more Judges of the High Court or Division Court are equally divided in opinion, an appeal lies to the High Court from such judgment, that is, the judgment of the senior Judge. Therefore, the Charter of 1865 substitutes for the practice under Act XXIII of 1861, by which a re-argument took place before two Judges, or one or more of the other Judges, a decision by two Judges in the first instance subject to an appeal which is given by section 15 of the Charter. The whole of those provisions must be treated, in our opinion, as qualifying the provisions of section 257. On appeals to the High Court that which is the final judgment of the High Court will be final.

2. The questions which came before Mr. Justice Kemp and Mr. Justice Glover were two, and they, in fact, involved two distinct issues; first, whether there had been a material irregularity in conducting, the sale; and, secondly, whether the applicant proved, to the satisfaction of the Court, that he had sustained substantial injury by reason of such irregularity. They are two distinct issues,--two distinct questions. On either of those questions, the answer of the Division Court, if adverse to the petitioner, would have involved the dismissal of his appeal.

3. On the first question, viz., whether there had been a substantial irregularity in the conduct of the sale, there was no difference of opinion between the two learned Judges before whom the question was argued. They went into the facts, examined the documents, and satisfied themselves that there had been an irregularity in conducting the sale. The irregularity alleged consisted in selling the property in a lump instead of selling it in separate lots, as advertised in the notification required by the 249th section. I may say in passing that I consider that if property is advertised in separate lots, it is an irregularity to sell it in a lump, without any intimation that it is to be so sold, Section 249, requiring a specification of the property to be sold, means a specification of the particular items of the property to be sold, and the selling of an entire property is not the same thing as selling separate items, parcels of such entire property. Cases may be easily imagined where it may be for the benefit of all parties that a property which has been advertised for sale in several lots should be sold in one lot. Such a sale, though irregular, may take place in good faith, and be advantageous to the debtor. On the other hand, it may be that such a sale would be productive of the greatest possible injury to the debtor. If a property is

advertised for sale in a very large number of small parcels, notice would be given to purchasers who would be capable of purchasing only small lots of land, and persons capable of buying the estate as a whole would probably not attend such a sale, as they would probably not like to run the risk of competing for a great number of parcels with a view of securing the entire estate. I put an illustration during the argument. Suppose an estate consisting of 1,000 acres of land were advertised for sale in small building lots. Capitalists who could purchase an entire estate would not receive the invitation which the 246th section is intended to ensure for the benefit of a judgment-debtor, and probably would not be in attendance at the sale. In the present case, there seems some little doubt as to the exact nature of the notification. The documents have been examined, and the point fully gone into and determined by Mr. Justice Kemp and Mr. Justice Glover, and they are agreed that the sale did not take place in accordance with the terms of the notification. Now on that point, an issue raised and decided by them, there is no difference of opinion.

4. The 36th clause of the Charter of 1865 provides that if the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the "Judges, if there shall be a majority, but if the Judges shall be equally divided, then the opinion of the senior Judge shall prevail." The point on which the learned Judges differed was whether the applicant proved that there had been any material injury by reason of the irregularity. The 15th section gives an appeal from the judgment of two Judges whenever such Judges are equally divided in opinion. In the case of [Shahazadi Hajra Begum Vs. Khaja Hossein Ali Khan](#) ; but see the report of the case, which has already come before the Chief Justice and two Judges, on the construction of section 15, it has been determined that an appeal only lies in respect of that part of the judgment upon which the two Judges differ. Now in that case, the judgment was capable of being separated, because it related to different parcels of property. Here it is capable of being separated in so far as it is a judgment on different issues, each of which was on a point on which a decision in favour of the decree-holder might have proceeded. We think that the issue in fact which has been disposed of and decided by the two Judges, not being a judgment or decision where those Judges are equally divided in opinion, is not a decision on which an appeal lies, and that we must accept their finding on that distinct and separable issue as final and binding upon us.

5. The only question, then, which we have to determine is whether it is proved that the applicant has sustained substantial injury by reason of the irregularity. Mr. Justice Kemp says: It is impossible to say that if the two factories had been sold separately, it may not have been that "purchasers would have been found for each lot." Now it seems to me that that is not a sufficient finding. It is not sufficient to show that it is possible that injury may have been sustained by the applicant. He must show affirmatively to the satisfaction of the Court that substantial injury has in fact been sustained from the irregularity. Therefore, if the matter is left in doubt, and Mr. Justice Kemp seems to admit that it is left in doubt, whether purchasers could be found to buy the estate if sold in separate lots, that

is not a sufficient finding to justify the setting aside of the sale.

6. The evidence that the property has been sold at an undervaluation is, in my opinion, extremely unsatisfactory. The witness on whom the applicant mainly relies proves that some two or three years ago he sold a four-anna share of this factory for 40,000 rupees. The factory was at that time in a very flourishing condition; 3,500 bigas of land were then under cultivation; and if the factory were now in the same condition, and if the prospects of indigo were the same now as they were then, it would go to show that the entire value would be 1,60,000 rupees. But that witness was cross-examined, and on cross examination he admitted that the factory had been of a different value; that he and Urquhart had purchased the entire factory a few years ago for 60,000 rupees. That was in 1859. At that time 1,800 bigas of land were under cultivation. He admits that the factory has now gone down very much. No question was put to him in re-examination, that though the factory had gone down, whether any thing like 1,800 bigas still remain under cultivation, and there is nothing to lead us to infer that that which represented the value in 1859 was the value at the present day. He was asked what was the value at the present day, and he said that he did not know, but that 37,000 rupees, which was the value for which the Pupri factory sold on the 15th of February 1869, was rather little.

7. Now, if we take the Pupri factory to be what was sold on the 15th February, it realized 37,000 rupees. If what was spoken of by the witness as the Pupri factory for which the witness thought that 37,000 rupees was rather little, included also the Bongoug factory, which was sold on the 2nd March, the entire property fetched 44,500 rupees

8. Now nothing could have been more easy than for the applicant to have shown what was the real value of the factory, and what it would probably have realized if the lauds belonging to it had been sold as zemindaries in separate lots. He had been in possession for years; he must have known how many bigas of land were under cultivation what was the average rental of land of similar kind in the neighbourhood, and what he could have realized if he had let it out to ryots in separate parcels. No evidence whatever has been given on these points; and, therefore, it appears to me that when the evidence of the principal witness of the debtor is fully understood, there is nothing to justify us in coming to the conclusion that the debtor sustained any substantial injury by the sale of the factory as a whole instead of selling it in separate lots.

9. The result is that, in my opinion, the decision of Mr. Justice Kemp must be reversed, and that the judgment-debtor must pay the costs both in this Court and in the lower Courts.

10. Mr. Cowell has brought to our attention a matter which I think ought not to pass without observation. We find that in this case the property has been purchased by the decree-holder, and after the objections of the debtor to the sale had been rejected by the Subordinate Judge, an application is made by the decree-holder to allow Mr. Lingham's name to be inserted as a sharer to the extent of six annas. That application was made by

Roy Nandipat Mahata on the 5th of April. Now I entirely concur with what has been said by the Chief Justice in the case of *Okhoy Chunder Dutt v. Erskine and others* 3 W.R. Mis. 11(14) that it is always necessary to watch with jealousy sales made in execution of decrees, especially when it appears that the property has been sold much below its value, and that the execution-creditor was the purchaser;" vigilance becomes still more necessary when we find that a person who had been acting as pleader for the judgment-debtor is joined as partner in the purchase with the decree-holder.

11. In the case of an attorney, a question of this kind came before the House of Lords in *Austin v. Chambers* 6 Cl. Fin. 1. The property of one Austin was put up for sale under writs of execution against him. Chambers, his attorney, attended, and having made the largest bidding, was declared the purchaser, and he paid the purchase-money. That sale took place in 1795. A bill in Chancery was filed to set aside the sale. The exact date of the bill does not appear, but the answer, which must have been put in very shortly afterwards, was put in February 1830, so that was thirty-five years after the sale. The House of Lords say : There were two points made for the appellant, impeaching the sale; one was that when the owner of the property found that there must be a sale, he desired "Mr. Chambers to attend and buy it for him as his agent. The other point was, that Mr. Chambers being his attorney and bound to do the best he could for his employer, could not support a purchase which he had made of his client's property." Lord Cottenham says: I have no hesitation in saying that if either of these propositions were made "out in the affirmative, the appellant would be entitled to recover this property, making of course, compensation, or repayment rather, to Mr. Chambers of the monies which he has expended upon the property, it being quite clear, according to the doctrine of a Court of Equity, that" an agent or solicitor, acting at the time as solicitor for the vendor, cannot himself purchase it for his own benefit" 6 Cl. Fin. 36, 37. On reference to the report of this case, it appears that the sale took place in 1819; the bill was filed in 1829, and the answer was filed in 1830, and that the final decree setting aside the sale was made soon after March 1839. The ultimate result of that case was that the House of Lords directed certain issues to be tried, and one of the issues was whether Chambers was the attorney of Austin at the time of the purchase; and the jury found a verdict for the plaintiff on that issue; and, therefore, after the lapse of thirty-five years, a purchase by an attorney under those circumstances was set aside.

12. In the present case, it is true that Mr. Lingham does not appear to have been the vakeel for Urquhart in the earlier part of the litigation, and, therefore, I give him the benefit of that. He was not the general vakeel of Urquhart, but he acted for him in the matter of the proceedings in execution- He was employed to obtain the order for the appointment of a manager He acted for Urquhart in consenting to the order for the sale in the manner I have stated. There is nothing to show that he was not vakeel of Urquhart down to the time of the sale, and I think that, except with the express consent of Urquhart, he was not justified in bidding at the sale. The fact that he joined as purchaser with the decree-holder has, throughout the case, cast the greatest suspicion on the case of the decree-holder.

Whether Mr. Lingham can sustain his purchase, or whether Roy Nandipat Mahata can support a purchase made jointly with the vakeel of the debtor to the prejudice of the person whose interests it was the duty of that vakeel to protect; whether the sale as regards either or both of these parties can be set aside,--are matters which must be decided in a separate suit, should it be brought. If there had been any substantial evidence to prove that the property had been sold at an under-value by being sold in a lump instead of in separate lots as advertised, I should have thought that the fact that the decree-holder and the vakeel of the debtor are found combining as purchasers a strong circumstance showing that such evidence might safely be relied on. But I cannot, in the absence of proper evidence of the value of the property and that it could have been sold, under other circumstances, at a higher price, merely because the decree-holder purchased along with the vakeel of the judgment-debtor, assume that it could have realized more money if sold in separate lots. If the applicant has a remedy against Mr. Lingham, or the decree-holder, because Mr. Lingham joined with the decree-holder in purchasing, his right is one which cannot be enforced under the 257th section. That equity must be worked out, if at all, by a regular suit.

Bayley, J.

13. I am of the same opinion, viz., that the judgment of Mr. Justice Kemp must be reversed, and that of Mr. Justice Glover affirmed.

14. There are three points for us to decide, Firstly, whether, as contended by Mr. Cowell, for the respondent, with reference to the provisions of section 257, Act VIII of 1859, an appeal does not lie before us. For the reasons given by Mr. Justice Norman, I concur with him in thinking that an appeal does lie.

15. The second point before us is whether, notwithstanding both the learned Judges in the Division Bench agreed in thinking that in this case there was an irregularity in the conduct of the sale, it is open to us now to see that, in fact, there was no such irregularity. I am of opinion that it is not, and that where both the learned Judges composing the Division Bench have agreed in their finding upon a certain point, we have no power in an appeal like this to question that finding. The words of section 36 of the Charter of 1865 are: "And if such Division Court is composed of two or more Judges, and the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided, according to the opinion of the majority of the Judges, if there shall be a majority; but if the Judges should be equally divided, then the opinion of the senior Judge shall prevail."--The words are perfectly clear and unmistakable, and had it been the intention of the Charter Act to provide that the whole judgment should be open to appeal, I do not think that such precise and distinct words would have been used as to the point of difference. It is also clear from the judgment of Mr. Justice Glover that there is only one point upon which the appeal has come before us. Mr. Justice Glover says: I concur in what has fallen from Mr. Justice Kemp with regard to the property sold, and I also concur in thinking that the selling of this property in a lump, instead of selling it in separate lots,

as advertised for sale in the notification, was an irregularity in the conduct of the sale; but I am not prepared to assent to that part of his judgment which makes the irregularity one which has been productive "of consequent damage to the judgment-debtor." Under such circumstances I do not think that we can hear an appeal upon any point other than that "point" upon which the two Judges have come to two very different opinions.

16. The third point before us is whether, by reason of the irregularity in the conduct of the sale, any substantial injury has been caused to the judgment-debtor, the objector in this case. This question turns entirely upon the evidence, and looking to all the circumstances of this case, shown by that evidence, as to the condition of the Pupri factory, and as to the state and value of the indigo market generally, as also to the fact that the auction sale was held in execution of a decree under a mortgage, I cannot find upon the evidence of Munnu Lall, relied upon by the judgment-debtor, nor of Mr. Ellis, anything to show that the value of the property was materially lower than the market value under similar circumstances to those we have before us. Munnu Lall says, that he considers the price fetched, viz., the sum of rupees 37,000, to be a little less than what the property ought to have fetched, but how much less it was, or how much more than 37,000 the real value of the property was, he could not state. Mr. Ellis also cannot say what the price (by which word I think he meant value) of the concern was. It is true no doubt that several persons mentioned that the property was worth a larger price, but they clearly did so upon certain considerations which would not ordinarily exist. One witness made the value, be stated, conditional on having a good and safe title to the land.

17. On the whole, I am of opinion that there is no such evidence on the record as would justify the Court in holding that there was a substantial injury caused to the judgment-debtor in consequence of any irregularity in the conduct of the sale. I also fully concur with all that has been said by Mr. Justice Norman with regard to the impropriety of a vakeel making himself in any way interested in a purchase in conjunction with the decree-holder, after having acted in regard to the execution, i.e., after the decree, on behalf of the opposite party, the judgment-debtor, Urquhart. Further I cannot understand how the Subordinate Judge in this case could have passed an order upon the petition of the 27th June, apparently without any notice upon the opposite party.

Hobhouse, J.

I agree with Mr. Justice Norman.

¹ The advertisement was as follows: Notice is hereby given that, at the instance of Roy Nandipat Mahata Bahadur, mortgagee, decree-holder, the Pupri Indigo Concern, and all the properties appertaining thereto, situated in the district of Tirhoot, the right and interest of Mr. Alexander Shaw Urquhart, judgment-debtor, shall be sold by public auction, to the highest bidder, on the 15th proximo, at the Subordinate Judge's Court, Tirhoot.

For further particulars, apply to the Subordinate Judge of Tirhoot.

Bhupati Roy

Subordinate Judge of Tirhoot.

Dated Mozufferpore, January, 1869."