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(1973) 12 CAL CK 0024

Calcutta High Court

Case No: F.M.A. No. 624 of 1968

Sedhendu Narayan Deb, Kumar — APPELLANT

Vs

Renuka Biswas — RESPONDENT

Date of Decision: Dec. 4, 1973

Acts Referred:

- Bengal Money Lenders Act, 1935 - Section 35
- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 66, Order 21 Rule 89, Order 21 Rule 90, 144, 151
- Transfer of Property Act, 1882 - Section 52

Citation: (1973) 1 CALLT 260 : (1974) 1 ILR (Cal) 334

Hon'ble Judges: Sen Gupta, J; A.K. Sinha, J

Bench: Division Bench

Advocate: N.C. Chakraborty and N.N. Biswas, for the Appellant;P.N. Mitter, A.M. Mailra, Pritish Ch. Roy, M.N. Chakraborty, B.M. Mitra, Haripada Mitra, A.N. Basu and Ambica Ch. Bhattacharyya, for the Respondent

Final Decision: Dismissed

Judgement

A.K. Sinha, J.

This appeal is preferred by Defendant judgment-debtor Appellant against an order dismissing his application u/s 47 of the CPC briefly in the following circumstances:

2. A mortgage suit was .filed by some of the heirs of one Sm. Prakashini Biswas in the Third Subordinate Judge''s Court-at'' Alipore for enforcement and sale of 2/3rd share of premises No. 117A Rash Behari Avenue, Calcutta, mortgaged by the predecessor of the present Appellant, Raja Abhoy Narayan Deb. In this suit, the predecessor of the present Respondent No. 5 was added as pro forma Defendant and transferred to the category of Plaintiffs. A preliminary decree was passed in all for Rs. 51,570, but provisions were made in the decree for realisation of 2/3rd of this amount by the original Plaintiffs and

1/3rd by the subsequent transferee decree-holder Respondent No. 5 of the added Plaintiffs by sale of the mortgaged property.

3. Ultimately, two execution cases were started by the respective set of decree-holders for realisation of the amount in their respective shares by sale of the mortgaged property. These two execution cases, however, were consolidated into one execution case and property mortgaged was ultimately sold on March 15, 1968, as the judgment-debtors failed to pay. Before the sale, an objection u/s 47 of the Code was filed on March 4, 1968, mainly on three grounds, namely, that (i) two execution cases were filed for sale of respective shares of decree-holder, (ii) mandatory provisions of Section 35 of Bengal Money Lenders Act were not complied with and (iii) the judgment-debtors Nos. 1, 2 and 3 have no saleable interest. But prayer for stay of sale was rejected with the result that the sale was held on Match 15, 1968. Thereafter, on April 11, 1968, an application under Order 21, r. 90 of the Code for setting aside the sale was filed by the present Appellant, and on his prayer confirmation of sale was stayed till disposal of this application. On May 18, 1968, the objection u/s 47 of the present Appellant was dismissed. The present appeal was filed in this Court on July 8, 1968.

4. Before we enter into the merits of the present appeal, it would be convenient to mention, at this stage, that the application under Order 21, r. 90 of the Code, it is admitted, was allowed to be dismissed for default by an order of the executing Court on August 3, 1968, and the sale was confirmed on September 14, 1968. One of the subsequent events which we need mention in this connection was that the appeal which was preferred against the preliminary decree was decreed on compromise in this Court on November 6, 1971, under which the first preliminary decree passed on July 25, 1962, was set aside and a new preliminary decree in the suit in terms of the compromise was passed.

5. Before us, in the appeal, the first point taken by Mr. Chakraborty on behalf of the Appellant is that a new preliminary decree under the compromise having been passed by this Court in the appeal, the final decree automatically fell through and consequently the sale held on the basis of such a final decree became invalid and void, even though the auction-purchaser was a stranger. On merits of the actual objection taken u/s 47 only first two grounds are pressed. Same arguments are repeated and it is contended in the first place that by separate execution cases the mortgaged property could not be put up for sale in two different cases for the respective shares of the decree-holders. In the second place, the Court not having complied with the mandatory provisions of Section 35 of the Bengal Money Lenders Act before the property was put to sale the entire proceeding in the execution cases was vitiated and the consequential sale of the disputed property could not stand.

6. We shall take up last two points first. It is not disputed that the two execution cases, though started separately, were consolidated into one case and the entire mortgaged property and not separate shares under separate execution cases was put lip for sale.

Relying on a Bench decision of this Court in Matilal v. Bara Buri 46 C.W.N 1015, as noticed by the Court below, it is argued by Mr. Chakraborty that there having been no proper prayer for sale of the entire mortgaged premises in default of the payment of the decretal amount in either of the execution cases, the whole proceeding was bad in law and the sale could not stand. In this case, however, there is no dispute that all the mortgagees joined in the suit as Plaintiffs and ultimately got a decree for sale of the entire mortgaged premises but at the same time their shares were defined and they were allowed to realise their separate shares. So, if there is such a provision in the decree itself, we think the decision in Matilal''s case 46 C.W.N. 1015 in terms cannot apply. In any case, the entire mortgaged premises, as rightly found by the Court below, was put up to sale for clearance of the dues of all the decree-holders. We do not, therefore, think there is any substance in this contention.

7. On the next point as to non-compliance with the provisions of Section 35 of the Bengal Money Lenders Act, it is said that it is clearly incumbent upon the Court to determine the valuation of the property sought lo be sold in auction, even though under the Calcutta amendment of Order 21, r. 66 of the Code the Court might have discretion to put both the Valuation given by the decree-holders and the judgment-debtor in sale proclamation. Reliance is placed on two Bench decisions of this Court, namely, Asharam v. Bijay Singh 47 C.W.N. 666 and Gayaprosad Vs. Seth Dhanrupmal Bhandari and Others, .

8. In the first mentioned case question arose whether in cases coming u/s 35 of the Bengal Money Lenders Act insertion of two valuations given both by the decree-holders-and the judgment-debtor in terms of the Calcutta amendment of Order 21, Rule 66 of the Code was sufficient compliance. It was held that the Court was required to determine on proper evidence the price and specify the property put up for sale and not merely insert the two valuations-given by the decree-holders and the judgment-debtor. We do not think this case is of any assistance to the Petitioner. For here, at the material time there was no application for relief u/s 35 of the Bengal Money Lenders Act. Instead, the judgment-debtor gave his own valuation inasmuch as the decree-holder did and the Court gave directions for insertion of the two valuations in the sale proclamation. The next-case, in our view, goes directly against the Defendant. In this case, the main objection against other things u/s 47 of the Code was that, there being no compliance with the provision of Section 35 of the Bengal Money Lenders Act, the entire proceeding for sale was bad in law. It was, however, found on facts that the Petitioner has failed to raise any objection at the time of settlement of sale proclamation under Order 21, Rule 66 of the Code which was the proper time to raise objection even u/s 35 of the Bengal Money Lenders Act. That being so, it was held that the Petitioner must be deemed to have waived . his right, such right being for individual and not for the public benefit, to raise the objection u/s 35 of the Bengal Money Lenders Act, even though'' it is clearly a statutory duty of the Court to comply with that provision. Mr. Chakraborty, however, has strenuously contended that there was no question of a waiver or estoppel on the facts of this case for the Petitioner at the time of settlement of sale proclamation raised his

objection as to valuation of the property and, in fact, submitted his own estimate as against the valuation put in by the decree-holder. It is said that the Court instead of determining the question of valuation merely inserted two valuations in the sale proclamation. It, however, appears that the Petitioner-Appellant did not take recourse to Section 35 of the Bengal Money Lenders Act but raised merely an objection for rejecting valuation given by the decree-holder on a statement that the property sought to be sold would be more than Rs. 3 lacs. This objection of the Petitioner was made on July 29, 1963. And upon such objection it, is not disputed that the Court made orders directing insertion of two valuations in the sale proclamation. It is, therefore, clear that the Appellant did not avail of his rights and remedies conferred by Section 35 of the Bengal Money Lenders Act at the time of settlement of sale proclamation. It is, however, unnecessary to refer to several other decisions of this Court and discuss the legal consequences that will follow such failure of the Appellant for the point seems to have been set at rest by a decision of the Supreme Court in Dhirendra Nath Gorai and Subal Chandra Shaw and Others Vs. Sudhir Chandra Ghosh and Others, , relied on by Mr. Mitter on behalf of the Respondent. It has now been held by the Supreme Court that the non-compliance with Section 35 of the Bengal Money Lenders Act is a defect in the sale proclamation and at best an irregularity and sale held is riot a nullity, for, such a right is there in the statute not in public but private interest and failure to avail of such right can necessarily constitute waiver which is ''an international relinquishment of a known right''. Necessarily, therefore, it is further held that non-compliance with Section 35 would be an irregularity within the meaning of the second proviso to Order 21, Rule 90 of the Code, but that objection could not be raised if the judgment-debtor did not raise it at the time of drawing .up of the sale proclamation. It is contended further by Mr. Mitter that since it is a matter under Order 21, r. 90, and not u/s 47 of the Code, such an application has to be filed within 30 days from the date of sale on a further proof that the judgment-debtor suffered substantial injuries, but no such case has been made out by the Appellant. It however appears, as already noticed, that on April II, 1968, which is also not disputed, an application under Order 21, Rule 90 raising same objection u/s 35 of the Bengal Money Lenders Act was filed by the present Appellant. But this application, registered as Misc. Case No. 39 of 1968 as appears from the order dated August 3, 1968, was allowed to be dismissed for default and the sale was confirmed on September 14, 1968. It is, therefore, clear that in view of the matter the Petitioner is not entitled to press that objection over again u/s 47 of the Code. In our opinion, therefore, the second point raised by Mr. Chakraborty is equally without substance and fails. Mr. Chakraborty did not press the third ground. We, therefore, agree with the decision of the Court below though on additional reasons.

9. We now come to the first point to see whether the sale held on the basis of "the earlier final decree became invalid and void merely because a new preliminary decree under the compromise was passed by this Court in the appeal preferred against the first preliminary decree. It is contended by Mr. Chakraborty that, although the point taken now before this Court in appeal was not the objection u/s 47, this Court has the power to go into the

subsequent events as an appellate Court for doing complete justice to the parties. In aid of such contention Mr. Chakerborty has relied on several decisions, namely, Lachmeshwar v. Keshawar Lal ILR (1940) 2 F.C. 84 and M. Laxmi and Company v. Dr. Anant R. Deshpanday AIR 1978.S.C. 171. The proposition laid down in the above decisions cannot be disputed, but the question really is what would be the effect or impact upon a sale already held in execution of a final decree which might automatically fell through owing to a new preliminary decree being passed by this Court in appeal, even though it is a compromise decree. It is contended by Mr. Chakraborty relying on a Full Bench decision of this Court in Talebali v. Abdul Aziz 31 C.W.N. 06 and also on a Supreme Court decision in Sital Parshad v. Kishori Lal A.I.R. 1967 S.C. 1236 that, as the final decree is superseded when a preliminary decree is set aside, an auction sale held in execution of that final decree even though confirmed automatically would be rendered invalid and it is argued that a stranger auction-purchaser in view of the amendment of Section 47 of the Code would be a party to the suit or original proceeding and necessarily be bound by all the legal consequences that would follow from the passing of a new preliminary decree. It is said that the question whether the sale held in execution of a decree would be set aside or not would be a matter relating to execution, discharge and satisfaction and will necessarily come under the purview of Section 47 of the Code. It is submitted that if the final decree, on the basis of which sale, as already held, ceases to exist with the passing of a new preliminary decree, all proceedings culminating in the ? sale of the disputed property in execution of such decree would be without jurisdiction and a nullity. Reliance is placed on a decision of this Court in Manmull Jain Vs. N.C. Putatunda, . In this case, what happened was that the sale'' in execution of a decree was held in contravention of Section 35 of the Bengal Agricultural Debtors Act, 1935. But the auction-purchaser applied thereafter to the Court u/s 151 of the Code to have the sale set aside claiming refund of the entire amount deposited by him on the ground that the sale was a nullity owing to the decree-holder''s failure to comply with the provisions of Section 35 of that Act. In that context, this Court held that, in view of the express prohibition contained in Section 35 of the Act, the Court acted without jurisdiction and, accordingly, the sale was a* nullity arid the Petitioner was entitled to get refund of the amount deposited by him. This case clearly has no bearing on the facts of the present case. For, we are now on a question concerning fate of a confirmed auction sale held in execution of a past final decree and not on a question of sale being held in contravention of any express statutory prohibition. At any rate, now in view of the decision of the Supreme Court in Dhirendra Nath''s case (Supra) the sale held even in contravention of any mandatory provisions of a statute would be, we think, an irregularity and not a matter affecting the Court''s jurisdiction. The other decision of the Patna High Court in Bansi Sao and Another Vs. Debi Prasad and Others, , cited by Mr. Chakraborty, equally fails to meet the requirements of the present case. For there the main question was whether a suit to set aside a sale held in execution of decree beyond time was barred u/s 47 of the Code and it was held that such a suit was not maintainable.

10. Nevertheless, it remains to be seen whether by a consequent reversal of a final decree owing to passing of a new preliminary decree validity of impugned sale held in execution of a valid preexisting final decree can be attacked under the provisions of Section 47 of the Code. According to Mr. Mitter, Section 47 has no application in such a case. Support is sought to be drawn from a decision of the Supreme Court in Janak Raj Vs. Gurdial Singh and Another, . In this case, there was a sale of a house in execution of an ex parte money decree, but the judgment-debtor instead of applying under Order 21, Rule 89 of the Code for setting aside the sale made an application for setting aside the decree which was subsequently reversed. After reversal of the decree application by the auction-purchaser was made under Order 21, Rule 92 of the Code for confirmation of the sale. It has been held that sale must be confirmed notwithstanding reversal of decree after sale. It was, however, not decided as to whether by virtue of amendment of Section 47 of the Code, the judgment-debtor could ask for restitution against a stranger auction-purchaser u/s 144 of the Code. Although the points actually decided in this case are not similar to the question involved in the instant case as contended by Mr. Chakraborty, we think, however, that this case is undoubtedly an authority for the proposition that a sale held in execution of a valid decree can neither automatically fall through nor can be challenged as invalid by subsequent reversal of the decree after such sale in an execution proceeding. We think, on principle there is no difference between automatic reversal of final decree, as in the instant case, owing to emergence of a new preliminary decree at a subsequent stage and a decree being set aside as a result of an application under Order 9, r. 13 of the Code or for any other reasons. Mr. Mitter has also cited before us a decision of Madras High Court in Ambujammal Vs. P. Thangavelu Chettiar and Another, where Wordsworth J. on a review of long line of cases followed the Judicial Committee in Seth Nanhalal v. Umrao Singh 58 I.A. 50 then laying down the same principle as now enunciated in Dhirendra Nath''s case (Supra) by the Supreme Court and further held that a right to challenge a sale under valid decree being purely a question of policy and not a question of justice the inherent power of the Court cannot be called in aid to justify the setting aside a sale under such circumstances so as to safeguard the judgment-debtor by doing an injury to the innocent auction-purchaser when the Code contains no provision for such a power.

11. It is true that Section 47 has since suffered an amendment but this decision appears, again, to have been approved by the Supreme Court. It follows that sales held in execution of a valid decree could only be set aside under circumstances set out in the relevant provision of Order 21 and not u/s 47 or Section 151 of the Cotton even though a stranger auction-purchaser would be deemed to be a party to the original suit regarding matters relating to execution, discharge and satisfaction of the decree. It is therefore clear that the present Appellant has no remedy u/s 47 of the Code to avoid the impugned sale held and confirmed in execution of a decree quite legal and valid at the material time.

12. Mr. Mitter has further attacked the new preliminary decree passed on the basis of a compromise between the Appellant and the Plaintiff decree-holder as collusive and

fraudulent. The argument is that the auction-purchaser was not made a party in the appeal nor any notice was given to him before effecting such a compromise. Granting, it is submitted that the appellate Court had the power to go into subsequent events, the question of the decree being tainted with fraud cannot be decided u/s 47 of the Code, nor at any rate can it be decided without evidence. It appears, this point in fact is taken by the Respondent-in-opposition to the affidavit of the Appellant in which for the first time the validity of the sale was disputed owing to subsequent events resulting in automatic reversal of the final decree. Mr. Chakraborty, however, wants us to brush aside the question of "fraud, for, he says that essential requirements in pleading fraud, i.e. particulars of fraud have not been given. But this is a matter not for us but for the Court which would be competent to set if fraud has been established. We are unable to discard the weighty argument of Mr. Mitter even on- this aspect of the matter. To back the argument of Mr. Chakraborty would be to deprive the Respondent of its right to plead and prove fraud even before an appropriate forum. We think, we would be justified in accepting the reason of Mr. Mitter in support of his argument in concluding that the Petitioner, even on consideration of this aspect of .the matter, has no remedy u/s 47 of the Code.

13. It is, then, contended by Mr. Chakraborty that under the new preliminary decree the judgment-debtors have paid all monies due to the decree-holders. But, if in spite of such payment the sale is allowed to stand the Appellant will be entirely without any remedy. Law cannot witness^ such an impossible situation. We think, however, law may not be an onlooker in such a case, for, as noticed by the Supreme Court in case of reversal ''of decree the party affected may have remedies u/s 144 of. the Code. Mr. Mitter, however, contends,*although by amendment of Section 47 the auction-purchaser must be deemed to be a-party to the original suit or proceeding, any such amendment is significantly absent in Section 144 of the Code and the only consequence is that the Appellant cannot avail of Section 144 against the stranger auction-purchaser in this case. Several cases are cited by Mr. Mitter in aid of his contention. But we think, in the facts and circumstances of this case it is not necessary for us to enter into the question. For, that can call for a decision only upon a proper application in the appropriate Court. We, therefore, leave this question open.

14. Lastly, a further point taken in support of the appeal on behalf of the decree-holder Respondents is that the impugned sale held during pendency of the appeal in This Court against the first preliminary decree was hit by principle of lis pendens u/s 52 of the Transfer of Property Act. Reliance is placed on a Bench decision of this Court in Tinoodhan v. Trailokya 17 C.W.N. 413. We do not think, this decision has any application to the facts of the present case. For here, there were two suits and two different decrees and in an execution of a later money decree against both the brothers, the property in dispute was auction purchased by the Plaintiff''s predecessor while the earlier mortgage suit on the same property against one of the brothers was pending and thereafter in execution of a mortgage decree the property was sold and the sale was confirmed. The

question here is very different. In the instant case, the property was sold in execution of a decree in the same suit in which a further decree was passed. Mr. Mitter is right in saying that principle of lis pendens as it is reflected in the provision of Section 52 of the Transfer of Property Act is totally inapplicable in the same suit. He has cited before us a decision of Bombay High Court in Shiblal v. Shambhu Prasad ILR 29 Bom. 435 where Jenkins G.J. clearly observed that the doctrine does not defeat a purchaser under a decree or order for sale when the lis pendens is the very suit in which that decree or order is passed.

We think the principle is well-established. In Maharaj Bahadur v. Surendra Narayan 19 C.W.N. 152 this distinction is clearly noticeable. In this case, the Court held that, although according to the decision of the Privy Council, patni in question was not saleable, the decision was given when the patni had been sold. Accordingly, as the lis pendens was a different suit to that in which the sale had been ordered, the principle was applicable and the sale was set aside. We, therefore, find no substance in the point raised.

15. The result is, the appeal fails and is dismissed. But there'' will be no order as to costs.

Sen Gupta, J.

16. I agree.