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Syed Mohiuddin and Others Vs Pirthichand Lal Choudhury

None

Court: Calcutta High Court

Date of Decision: Aug. 26, 1914

Acts Referred:
Civil Procedure Code, 1908 (CPC) â€" Order 41 Rule 2#Transfer of Property Act, 1882 â€" Section 90

Citation: AIR 1915 Cal 444 : 31 Ind. Cas. 664

Hon'ble Judges: Beachcroft, J; Asutosh Mookerjee, J

Bench: Division Bench

Judgement

1. This is an appeal by the first party defendants in a suit for declaration of title to Immovable property and for recovery of possession thereof. The

lands in dispute originally belonged to one Syed Ashgar Reza, Khan Bahadur, and the plaintiff as also the first party defendants claim to have

acquired his interest, the former by purchase at a sale in execution of a money-decree, the latter by purchase at a sale in execution of a

certificate""under the Public Demands Recovery Act, 1895. The history of the devolution of the interest of the original admitted owner, as alleged

by each of the rival claimants, may be briefly stated. Pirthichand, the present plaintiff, in execution of a decree for money against Ashgar Reza

made u/s 90 of the Transfer of Property Act, attached the disputed lands on the 6th November 1905. At the execution sale, which followed in due

course, he became the purchaser on the 5th February 1907; the sale was confirmed on the 11th May 1907 (Exhibit 5. Meanwhile, the manager of

the Khagra Estate under the Court of Wards had, on the 10th October 1904, made a requisition to the Collector of Purnea, u/s 9(1) of the Public

Demands Recovery Act, for a certificate with a view to recover from Ashgar Reza a sum of Rs. 4,723 on account of arrears of rent. The

Certificate Officer made what purports to be a certificate on the 11th October 1904. Notice u/s 10 was thereupon ordered to issue upon the

defaulter, and, it is said, was served on him on the 28th October 1904. Before the lands could be sold, Ashgar Reza died, and, on the 16th June

1905, notice was directed to issue on his heirs, his brother and his widow, who are the second party defendants in this litigation. What was

intended to be a notice to the heirs of the deceased defaulter but was framed as a notice of a fresh certificate issued against them, is said to have

been duly served before the 1st July 1905. The lands were sold to the proprietors of the Khagra Estate for Rs. 8U0 on the 9th January 1908, and

the sale was confirmed on the 12th March 1906. The purchasers are the first party defendants in this suit. It will be observed that the attachment

under the decree held by the plaintiff as also the sale held in execution thereof were subsequent to the attachment and sale respectively under the

certificate. But when the sale under the certificate was held, there was a valid subsisting attachment on the lands under the decree of the plaintiff

This, however, is of no assistance to the plaintiff, because the purchasers at the sale Under the certificate, have not acquired the property subject to

the right of the plaintiff, if any, under his attachment. It is well settled that the attachment creates no charge or lien upon the attached property; it

merely prevents private alienation; it does not confer any title on the attaching creditor: Moti Lal v. Karrabuldin 24 I.A. 170 : 25 C. 179 : 1

C.W.N. 639 Raghunath Das v. Sundar Das 24 Ind. Cas. 304 : 1 L.W. 567 : 27 M.L.J. 150 : 16 M.L.T. 353 : (1914) M.W.N. 147 : 16 Bom.

L.R. 814 : 18 C.W.N. 1058 : 20 C.L.J. 555 : 13 A.L.J. 154 : 42 C. 72 Soobul Chunder v. Russick Lal 15 C. 202 Mandaleswara Katari v.

Prayag Dossji 2 Ind. Cas. 18 : 32 M. 429 : 19 M.L.J. 401. Consequently as the first party defendants purchased the property on the 9th January

1903, if the sale was validly held under the Public Demands Recovery Act, there was no interest subsisting in the judgment-debtor when the

plaintiff purchased at the sale held in execution of his decree on the 5th February 1907. Thus the substantial question in controversy between the

rival claimants is, whether the sale held on the 9th January 1900 was valid and operative under the Public Demands Recovery Act. The

Subordinate Judge has answered this question against the defendants and has decreed the suit. On the present appeal the point for consideration is,

whether the certificate sale, which is the root of the title of the defendants, is valid and operative in law. But before we examine this question, it is

necessary to advert for a moment to a preliminary point urged by the appellants.

2. The appellants have contended that the question of the legality of the proceedings under the Public Demands Recovery Act was not raised in the

issues framed in the suit and should not be investigated. It may be conceded that the issues as framed, do not directly and specifically raise the

question of the legality of the certificate proceedings; that fact, however, does not necessarily show that the point is not open for consideration. The

principle applicable in these circumstances was formulated by Sir James Colvile n Musammat Mitna v. Fuzl Rub 13 M.I.A. 573 : 15 W.R.P.C. 15

: 6 B.L.R. 148 : 2 Suth. P.C.J. 387 : 2 Sar. P.C.J. 626 : 20 E.R. 665. That principle is that where the parties have gone to trial knowing what the

real question between them was, the evidence has been adduced and discussed, and the Court has decided the point as If there was an issue

framed on it, the decision Will not be set aside in appeal simply on the ground that no issue was framed on the point; in other words, as Selwyn,

L.J., observed in Katchekaleyana v. Kachiviyaya 12 M.I.A. 495 : 11 W.R.P.C. 33 : 2 B.L.R. 72 : 2 Suth. P.C.J. 206 : 2 Sar. P.C.J. 461 : 20

E.R. 426 the mere omission to frame an issue is not fatal to the trial of the suit. On th4 other hand, as Lord Westbury held in Baboo Rewun

Pershad v. Jankee Pershad 11 M.I.A. 25 : 2 Sar. P.C.J. 214 : 20 E.R. 10 where the failure to frame the issue has led to an unfair trial 6r

miscarriage of justice, the case will be remanded for re-trial. These principles have been repeatedly applied, as illustrated by the cases of

Soorjomonee v. Suddanund 20 W.R. 377 : 12 B.L.R. 304 : Sup. . I.A. 212 Chandra Kunwar v. Narpat Singh 34 I.A. 27 : 11 C.W.N. 321 : 29

A. 184 : 11 C.W.N. 321 : 4 A.L.J. 102 : 5 C.L.J. 115 : 17 M.L.J. 103 : 2 M.L.T. 109 : 9 Bom. L.R. 267 (P.C.) Perladh v. Broughton 24 W.R.

275 Muttayan v. Sangili 12 C.L.R. 169 : 6 M. 1 9 I.A. 128 : 4 Sar. P.C.J. 354 : 6 Ind. Jur. 486 : 5 Shome L.R. 7 Mahomed Basiroollah v.

Ahmed Ali 22 W.R. 448 Sayad Muhammad v. Fatteh Muhammad 22C. 324 : 22 I.A. 4 Secretary of State v. Dipchand 24 C. 306 Balmakund v.

Dalu 25 A. 498 : A.W.N. (1903) 112. Tested in the light of these principles, the objection urged by the appellants proves to be wholly groundless.

The title of the defendants was expressly attached in the plaint, and the plaintiff specifically sought a declaration that the certificate sale was invalid

and of no effect and that the defendants had acquired no title to the properties in suit. The course of the trial in the Court below gives ample

indication that the parties have directed evidence to this point and the matter has been elaborately discussed by the Subordinate Judge. There is no

trace of any objection taken by the defendants to the investigation of this question, and it is remarkable that the objection does not find a place in

any of the twenty grounds taken in the memorandum of appeal presented to this Court. Consequently, under Order XLI, Rule 2, of the Civil

Procedure Code, the appellants are not entitled to urge this ground, except by leave of the Court. this Court might in its discretion have refused

such leave, but the point was allowed to be argued as it was felt that if the defendants were really taken by surprise in the Court below, the case

might be re-tried. On investigation, however, it appears that not only were they not taken by surprise, but they adduced a considerable body of

evidence in support of their title. We hold accordingly that the defendants have not been prejudiced in any way, that the objection, neither taken in

the Court below nor in the memorandum of appeal here, is wholly unsubstantial.

3. In the investigation of the question of the legality of the certificate proceedings, on which the title of the defendants rests, the successive stages

may be usefully recapitulated. In the first place, a requisition for a certificate is made u/s 9(1). In the second place, a certificate is made by the

Certificate Officer u/s 9(3). In the third place, a copy of the certificate and a notice in the prescribed form are required to be issued to the

judgment-debtor u/s 10(1) and to be served upon him in the manner specified in Section 31. In the fourth place, the certificate is enforced u/s

19(2) and executed in the manner provided by the CPC for the enforcement of decrees for money. We shall now investigate what steps were

taken to comply with the statutory requirements at each of these stages, and the legal effect of the omission, if any, to carry out strictly the

directions given by the Legislature.

4. As regards the first step, it has been pointed out by the respondent that the requisition is not signed as required by Section 9(2), and it has also

been contended that it was not verified by the manager of the Khagra Estate, though this latter assertion has not been made out. Section 9(2)

provides that every requisition mentioned in sub Section I shall be signed and verified by the officer in authority or manager making it in accordance

with the provisions of Order VI, Rules 14 and 15, of the CPC as to the verification of plaints. In the present case, the requisition is not signed by

the manager, as is clear if Exhibit K is contrasted with Form No. 3 in the Schedule appended to the Public Demands Recovery Act. It has been

argued that the requisition was neither signed nor verified by the manager or by any duly authorised person on his behalf and that consequently all

subsequent proceedings on the basis of the requisition must be deemed a nullity, as the requisition takes the place of a plaint in a regular suit. We

are not prepared to give effect to this contention. It was pointed out in the case of Ashutosh Sikdar v. Behari Lal 11 C.W.N. 1011 : 35 C. 61 : 6

C.L.J. 320 that it cannot be affirmed as a proposition of law of universal application that non-compliance with every requirement of a Statute

makes the proceedings a nullity, and illustrations were given of cases Where the violation of an express provision of a Statute may not nullify the

proceedings as also of cases in which failure to comply with statutory directions may completely vitiate the proceedings. No hard and fast line can

be drawn between a nullity and an irregularity, and when the provision of a Statute has been contravened, if a question arises as to how far the

proceedings are affected thereby, it must be determined with regard to the nature, scope and object of the particular provision violated. Now in the

case of a plaint which is required to be signed and verified, it has been held that if it has not been duly signed or verified, the plaintiff may be

allowed to remedy the defect, if discovered, at any stage in the primary Court or in the Appellate Court, but the Appellate Court should not

dismiss the suit on the ground of such defect; the reason is that the defect does not affect the merits of the case or the jurisdiction of the Court:

Mohini Mohun Das v. Bungsi Buddan Saha 17 C. 80 : 5 Sar. P.C.J. 498 Basdeo v. Smidt 2 2A. 55 : A.W.N. (1899) 172 Rajit Ram v. atesar

Nath 18 A. 396 : A.W.N. (1896) 102 Fateh Chand v. Mansab Rai 20 A. 442 : A.W.N. (1898) 110. There is no good reason why a different

principle should he applied to requisitions u/s 9(1). The provision in Section 9(3) that the Certificate Officer may take action on receipt of such

requisition, that is, a requisition duly signed and verified u/s 9(2), does not necessarily show that if he proceeds on the basis of a defective

requisition, the certificate he makes is void in law. If the contrary view were adopted, it would follow by analogy that the decree in a suit instituted

on a defective plaint is a nullity. We must consequently overrule the contention of the respondent that the defect in the requisition in this case

affected the jurisdiction of the Certificate Officer and nullified all the proceedings taken by him. It cannot be disputed, however, that the defect in

the requisition was but the initial step in a series of deviations from the requirements of the Statute.

5. As regards the second step, it has been argued that no valid certificate was made by the Certificate Officer in this case. Section 9(3) provides

that on receipt of the requisition the Certificate Officer, if satisfied that the demand mentioned therein is justly recoverable, may make, under his

hand and in Form No. 2 in the Schedule annexed to the Act, a certificate of the amount of such demand remaining unpaid, together with the cost of

any Court-fee paid in respect of the requisition under Sub-section 2, and shall cause the same to he filed in his office. The form mentioned shows

that the name and address of the debtor, the amount of the public demand for which the certificate is made, together with the particulars thereof

and the name of the person deemed to be the decree-holder are to be set out in a tabular statement; then follows the actual certificate in these

terms: ""I hereby certify that the above mentioned sum of Rs...is due to the Secretary of State for India in Council, or to A B, a Ward of Court, or a

minor or a lunatic by his next friend C D, or, as the case may be, from the above-named. Dated this...day of...19. A, B, Certificate Officer of..."" It

is plain that the space left blank for the insertion of the amount for which the certificate is to be made, must be filled up before the certificate is

signed; the various alternatives given for the person from or to whom the amount is due, must also be struck out, except the one applicable to the

circumstances of the particular case. In the case before us, the certificate was signed as given in the printed form as follows: I hereby certify that the

amount specified above Rs...is justly due to the Secretary of State for India in Council or manager of Estate Board Adalat or minor or lunatic or,

as the case may he, from the above-named person."" The certified copy of the certificate on the record does not specify the amount for which it is

made nor the persons to whom it was due. The respondent has suggested that although the blank space left for the insertion of the amount was not

filled up, the amount might, as a matter of fact, be ascertained from the information given in the tabular statement. On careful examination of the

figures given in the fourth and fifth columns of the tabular statement, this turns out, however, to be impracticable. The fifth column shows that the

total amount of arrears of rent and cess is Rs. 4,190-11-2, while the aggregate amount due for rent, cess, dak-cess and interest is Rs, 4.723-5-8

1/4. This figure also appears at the top of the right hand portion of the fourth column, which is headed ""Amount of the public demand for which this

certificate is made."" Then follow several entries on account of process-fee, stamp and Court-fee, which make up a total of Rs. 208-7-0. This,

added to the figure brought from the fifth column, gives an aggregate of Rs. 4,931-12-81/4. Then follow four other items on account of stamp and

paper, which make up Rs. 61-1-3. This gives a total of Rs. 4,992-13-111/4. It is impossible from the certified copy to say how many of these

entries had been made before the certificate was signed by the Certificate Officer. There are also other entries in the fourth column, some of which

at any rate must have been made after the certificate had been signed, for instance, items as to interest which had accrued due during: the year

1905-07, It is consequently impossible to say to what precise figure in the tabular statement reference was intended to be made by the expression

the above-mentioned sum of Rs..."" in the certificate. It is remarkable, however, that none of the possible figures, namely, Rs. 4,190-11-2, Rs.

4,723 5-8 1/4 Rs. 4,931-12-8 1/4 and Rs. 4,992-13-11 1/4 agrees with what would be the correct figure according to the law. u/s 9(3), the

certificate is to be made for the amount of demand remaining unpaid together with the cost of Court-fee paid in respect of the requisition u/s 9(2) If

it be assumed that the amount of demand unpaid was Rs. 4,723-5-8 1/4 as to which, however, we have no information, the amount for which the

certificate could be validly made was Rs. 4,988-5-8 1/4, inasmuch as Rs. 265 was the Court-fee paid on the requisition. It is thus plain that from

the certified copy of the certificate it is impossible to determine the precise amount for which the certificate was intended to be made. In these

circumstances, we decided to send for the original certificate from the Collectorate with a view to ascertain the condition of the certificate when it

was first made, by discriminating, if possible, the entries originally made from those subsequently added. The original certificate which has been

received after considerable delay, is, however, of no assistance, for, as we shall presently explain, it bears indication of interpolations made very

probably after the close of the arguments in this appeal. What is shown in the certified copy as blank space for insertion of the amount, has been

filled up by the figures Rs. 4,623-5-9 1/4. There is little room for doubt that these figures were not in the certificate when first drawn up. In the first

place, as already stated, the space is blank in the certified copy which was prepared on the 19th August 1909, compared with the original on the

17th March 1910 and certified to be a true copy on the 18th March 1910. The copy was filed by the plaintiff and was used as evidence on behalf

of the defendants. They would never have relied on the certified copy as correct, if there had been a variation in such a material particular between

the copy and the original. The judgment of the Subordinate Judge shows that before him the validity of the certificate was attacked on the ground

that it did not specify the amount; the defendants would surely have asked the Court to send for the original if the latter did in fact specify the

amount, or have procured a correct copy of it. In the second place, the amount as inserted in the certificate reads as Rs. 4,623-5-8 1/4 which

does not agree with Rs. 4,723-5-8 1/4 shown in columns 4 and 5 of the tabular statement. If the figures in the certificate be read as Rs. 4,723

instead of Rs. 4,623, it is obvious that they could not have been written by the same person as made the entries in columns 4 and 5. The figure ""7

occurs in several places in column 5, and is uniformly different in form from the second figure in the amount in the certificate. On the other hand, it

has some similarity with ""7"" as written by the copyist who prepared the certified copy on the record. In the third place, the figures inserted in the

certificate, if read as Rs. 4,623, not only do not agree with any of the totals mentioned in columns 4 and 5, they, are different from what would be

the correct sum due. We must consequently proceed on the assumption on which the case was tried in the Court, below, namely, that as shown by

the certified copy of the certificate, it did not specify the amount and left blank the space intended for the insertion of the figures; it is also

impracticable to ascertain the original condition of the certificate. It is plain from the decision of the Judicial Committee in Mahomed Abdul Hai v.

Gujraj Sahai 20 I.A. 45 : 23 C. 775 which affirms the decision in Gujraj Sahai v. Secretary of State 17 C. 414 and Baij Nath Sahai v. Ramgat

Singh 23 I.A. 45 : 23 C. 775 which affirms the decision in Baij Nath Sahai v. Ramgat Singh 5 C.L.J. 687 that a certificate drawn up as the present

one has been, cannot be made the foundation for valid proceedings against the property of the defaulter. Lord Davey, in the case last mentioned,

after referring to the provisions of the Act and holding that if no certificate is given in accordance with the Statute, the whole basis of the

proceedings for the sale is cut away, observed as follows: ""It is obvious that those are very stringent provisions. The proceeding in the first instance

is apparently ex parte. The certificate is to be made by the Collector in a certain form and filed, and when the certificate is filed, it has the effect of

a decree against the persons named as debtors in the certificate so far as regards the remedies for enforcing it, and when served, it also binds their

Immovable property. It is unnecessary to point out the necessity there is, when power is given to a public officer to sell the property of any of Her

Majesty''s subjects, that the forms required by the Act, which are matters of substance, should be complied with, and that if the certificate is to

have the extraordinary effect of a decree against the persons named in it as debtors and to have the effect of binding their Immovable property, at

least it should be in a form, such as provided by the Act, which enables any person who reads it to see who the judgment-creditor is, what is the

sum for which the judgment is given, and that those particulars should be certified by the hand of the proper officer appointed by the Act for the

purpose. If no such certificate is given, then the whole basis of the proceeding is gone. There is no judgment, there is nothing corresponding to a

judgment or decree for payment of the amount, and there is no foundation for the sale. The authority to proceed to the sale is based on the

certificate which has the effect of a judgment or decree, and if no judgment or decree is given, and no certificate is filed having the force or effect of

a judgment or decree, there can be no valid sale at all."" It is further clear that the Certificate Officer must have, in the present case, mechanically

signed the printed form without perusal and consideration In this connection, the observations of Pigot, J., in Baijnath Sahai v. Ramgut Singh 5

C.L.J. 687 are relevent: ""The sub-section does not require the Certificate Officer to issue the certificate, the word used is "may." The obvious

intention is that he shall use his discretion as to the issue of a certificate, to determine whether the case is a proper one for it, whether the money be

due or not."" There is little doubt that in the present case, what Pigot, J., describes as the ""chief safeguard of the Act, the personal care of the officer

entrusted with this duty"" had failed. It follows that there was no valid sale, as there was no certificate duly made under the provisions of the Act. In

this view, it is needless to examine in detail the other objections which have been taken to the regularity of the certificate proceedings, but a brief

reference may be made to them to illustrate the carelessness which throughout characterises these proceedings.

6. As regards the third step, it is necessary to observe that after the certificate has been filed in the office of the Certificate Officer, he is required to

issue to the judgment-debtor a copy of the certificate and a notice in Form No. 4 prescribed in the Schedule to the Act. The papers as to return of

service in the certificate case, have been destroyed in accordance with the rules for the destruction of Court records. The defendants have

consequently been constrained to adduce oral evidence to prove that service was effected in the manner laid down in Section 31. The defendants

are bound to prove service of notice and copy of certificate, because the mere entry in the order-sheet of the certificate case that notice has been

served is no proof that service was effected: Mir Tapura v. Gopi Narayan 7 C.L.J. 251 Radhay Koer v. Ajodhya Das 7 C.L.J. 262 and Ananda

Kishore v. Daiji Thakurain 1 Ind. Cas. 549 : 36 C. 726 : 10 C.L.J. 189. The Subordinate Judge has disbelieved the evidence of service of notice.

We are not disposed to agree with him on this point. The witnesses pledge their oath that the notice was taken to Ashgar Reza, who directed it to

be taken to his principal officer. There is no good reason why this testimony should be discredited. No weight can be attached to the circumstance

that a claim was not put forward to the attached property by the wives of the judgment-debtor, in whose favour he had executed deeds in lieu of

their dower. The story of service, as narrated by the witnesses, seems probable, and we are not prepared to reject it as mythical. Nor are we

prepared to agree with the Subordinate Judge that personal service was not effected in accordance with Section 31 on Ashgar Reza. What

happended was that the notice was tendered to him by one of his servants to whom it had been made over by the Collectorate peon. He directed

the notice to be taken to his officer, Nasiruddin. The notice was then handed over to Nasiruddin, who gave the usual receipt. This was clearly-full

compliance with the requirements of Section 31, which provides that service shall be made by delivering of tendering a copy of the notice to the

judgment-debtor; this was done in the present case. But it cannot be overlooked that there is no evidence that a copy of the certificate itself was,

as required by Section 10(1), served upon the judgment-debtor. Even the entry in the order-sheet makes no mention of the issue of a copy of the

certificate. The defendants have contended that a presumption should be made in favour of the regularity of the proceedings; but, as was pointed

out by Pigot, J., in Gujraj Sahai v. Secretary of State 17 C. 414 and by Lord Watson in Mahomed Abdul Hai v. Gujraj Sahai 20 I.A. 70 : 20 C.

826 when the circumstances of the case show that the proceedings have teen carried on in a careless or slovenly manner, the Court will be slow to

apply the maxim omni praesumuntur rite et solemniter esse acta donee probetur in contrarium. If the copy of the certificate was not serted as

required by Section 10, there could be no valid sale: Puran Chandra v. Dinabandhu 11 C.W.N. 756 : 34 C. 811 : 5 C.L.J. 696 : 2 M.L.T. 371.

The requirements of Section 10 must be strictly carried out to give the Certificate Officer jurisdiction to fell the property of the defaulter, because it

is only after they have been fulfilled that a sale can be held.

7. As regards the fourth step, it is plain that the notice issued upon the heirs of the judgment-debtor was irregular. Exhibit 22 purports to be a

notice to the heirs of the judgment-debtor u/s 10 and recites that a certificate for Rs. 5,348 had been made against them on the 16th June 1905.

This was a mis-statement, for which there was no foundation whatever. There is no trace of a certificate made against the addressees on the 16th

June 1905. Consequently, though it is recited in the notice that a copy of the certificate mentioned was annexed, none could have been sent. As

Lord Davey said in the case already mentioned, notice that a certificate has been made, is not equivalent to a certificate having been made, and if

there was no Certificate, then notice to the proprietor that a certificate had been made and filed could not he a compliance with the Act. It is a

matter for surprise that even long after the strong condemnation of irregularities in certificate proceedings by this Court and by the Judicial

Committee in the cases mentioned, they should be characterised by carelessness as evidenced in the case before us.

8. We hold accordingly that there was no valid and operative certificate made in compliance with the statutory requirements and that the sale at

which the defendants made their purchase did not affect the right, title and interest of the judgment debtors, which subsequently vested in the

plaintiff. The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.