
(1949) 06 CAL CK 0009
In the Calcutta High Court
Case No : A.F.O.D. No. 326 of 1944

Amulya Ratan Mukherjee

APPELLANT

Vs

Sm. Kanak Nalini Ghose and Others

RESPONDENT

Date of Decision : 21-06-1949

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 32 Rule 15
Evidence Act, 1872 — Section 115
Specific Relief Act, 1877 — Section 42

Citation : AIR 1950 Cal 30 : 53 CWN 835

Hon'ble Judges : Lahiri, J;G.N. Das, J

Bench : Division Bench

Advocate : Hiralal Chakravarti and Shyamdas Bhattacharjee, for the Appellant; Diptendra Mohan Ghose and Ors., Uma Shankar Sarkar for No. 2 and Apurbadhan Mukherjee and Bireswar Chattapadhyay for No. 3, for the Respondent

Final Decision : Allowed

Judgement

Lahiri, J.—The appellant Amulya Ratan Mukherjee instituted the suit out of which this appeal arises for a declaration that the ex parte decree passed in Title Suit No. 52 of 1940 of the Court of the fourth Subordinate Judge, 24-Par-ganaa and the execution proceedings arising out of it and the auction sale held therein are not binding upon the plaintiff appellant and that the title of the plaintiff has not been affected by the said decree and sale. The subject-matter of the dispute is the pucca ancestral dwelling house of the plaintiff standing on 12 cottah and 13 chattacks of land in mouza Kantalpara police station Naihati. The case of the plaintiff is that his father Lakshmi Narayan Mukherjee borrowed a total sum of Rs. 2400 on the basis of three mortgage bonds on various dates between 1934 and 1937 from defendant 2, Kanak Nalini Ghose. On 9th August 1939, defendant 2 instituted Title Suit No. 52 of 1940 for sale of the mortgage premises for the realisation of her dues from Lakshmi Narayan Mukherjee. In the month of August 1939 Lakshmi Narayan left his house in a fit of insanity and never returned and

he met with his death on the footpath of Hari Ghose Street in Calcutta, on 6th February 1942. On account of the disordered condition of the brain of Lakshmi Narayan, the mortgage suit could not be properly defended and although the mortgagee Kanak Nalini was aware of the defect of Lakshmi Narayan, she took no steps to have a guardian ad litem appointed, obtained an ex parte decree and in execution thereof brought the mortgaged property to auction sale at which it was purchased by defendant 1, Akhil Chandra Ghose, on 10th January 1942 for a sum of Rs. 5500. This suit was instituted by the plaintiff on 4th March 1942 and it appears that defendant 3, Gour Mohan Kundu, purchased the house from defendant 1 for the same amount by a registered conveyance dated 22nd September 1942 and he was thereafter added as a party to the suit by an order dated 8th January 1943.

2. The suit was contested by the auction purchaser defendant 1 and also by the purchaser pendente lite defendant 3 principally on the ground that the plea of Lakshmi Narayan's insanity was a mere cloak to give an air of plausibility to the false claim of the plaintiff; that the story of Lakshmi Narayan's death was false, that Lakshmi Narayan was still alive and that Lakshmi Narayan left his house not in a fit of insanity as alleged by the plaintiff but on account of the maltreatment at the hands of the plaintiff and began to live with a concubine. Defendant 1 also raised some pleas in bar, namely that the court-fee paid by the plaintiff was not sufficient in law, that the suit was barred by estoppel and that the suit was barred u/s 42, Specific Relief Act.

3. All the preliminary issues raised by the defendant were decided by the learned Subordinate Judge against the plaintiff. On the question of court-fees, it was held that the plaintiff having succeeded to the rights and liabilities of his father, should have prayed for setting aside of the ex parte decree and should have paid ad valorem court-fees on the value of the decree. As to the bar u/s 42, Specific Relief Act, it was held that it was incumbent on the plaintiff to ask for further relief for setting aside of the ex parte decree and as that was not done, the suit was not maintainable under that section. To appreciate the case of estoppel, it is necessary to recite certain facts. It appears that during the pendency of the mortgage suit the plaintiff, Amulya Ratan, filed an application on 9th December 1940 alleging that his father Lakshmi Narayan Mukherjee became completely insane in or about the first week of July 1939 and had not been heard of since then and in these circumstances it was necessary to have a guardian ad litem appointed. This application is Ex. E. On 15th March 1941 when this application was taken up for hearing, the plaintiff Amulya Ratan was found absent on call and the Court proceeded with the trial without making any appointment of guardian ad litem upon the view that Lakshmi Narayan was not insane. It is said that the failure of the plaintiff to prosecute the application filed on 9th December 1940 brings into operation the principle of estoppel and the plaintiff is precluded by law from challenging the decree that was passed against his father.

4. On the merits of the case, the learned Subordinate Judge has held that though

Lakshmi Narayan died on the streets of Calcutta on or about the date alleged by the plaintiff the evidence adduced by the plaintiff was too meagre and insufficient for a clear finding of insanity and upon that evidence one could not come to a clear conclusion that Lakshmi Narayan became insane in July or August 1939.

5. We have no hesitation in holding that the decision of the learned Subordinate Judge on all the preliminary issues is vitiated by a total misconception as to the nature of the plaintiff's case. Upon the case made in the plaint, the ex parte decree against the plaintiff's father was void for want of representation of Lakshmi Narayan who was alleged to be of unsound mind. Upon that pleading it was not necessary for the plaintiff to make the prayer for setting aside of the decree and it was enough to ask for a declaration that the said decree did not affect the plaintiff's title. So the questions of payment of ad valorem court-fee and the bar of Section 42, Specific Relief Act, did not arise at all. On the question of estoppel, we desire to point out that the plaintiff was under no legal obligation to file any application alleging the insanity of his father, far less to prove it. He was merely an intervener and if the mortgagee chose to proceed with the hearing of the suit without taking steps for the representation of Lakshmi Narayan, she did so at her risk. We cannot see how any question of estoppel arose in these circumstances. There was no change in the position of the mortgagee on account of the representation made by Amulya. The order was also not binding on Amulya inasmuch as he alleged that it was void even against his father, Lakshmi Narayan.

6. Turning to the merits of the case, we have first of all to consider the circumstantial evidence to determine the value of the oral evidence adduced by the parties. The circumstances which have been proved beyond all doubt are these: (1) Lakshmi Narayan, a resident of Naihati, was a railway servant serving in the Loco Shed of the Eastern Bengal Railway at Cossipore. (2) His wife died in 1920. (3) His youngest son died in 1921 or 1922. (4) Two other sons died in 1925 and 1926 and one of these sons committed suicide. (5) Lakshmi Narayan had a serious attack of typhoid in 1929 which slightly affected his brain. He was on sick leave from 1929 to 1932 and retired prematurely in 1932. (6) Lakshmi Narayan disappeared from his house in August 1939 and was not heard of till he was picked up by the Calcutta Police on the foot path of Hari Ghose Street on 5th February 1942, in an unconscious condition. He was sent to the hospital where he died without regaining consciousness. Certain letters were found in his person which established his identity. Relying on these letters the police informed the Chitpore Loco Shed which in its turn informed Naihati Loco Shed. P. W. 4, Shiba Prosanna Bhattacharjee, an employee of the Naihati Loco Shed, on receipt of the information wrote the letter, Ex. 1 dated 8th February 1942, to Amulya Ratan Mukherjee, the plaintiff, who immediately came to Calcutta, identified the dead body of his father and cremated it on 9th February 1942.

7. On these facts, Mr. Chakravartti, appearing on behalf of the plaintiff, has argued that the mental agony resulting from a number of bereavements in quick

succession adversely affected the mental constitution of Lakshmi Narayan and when that was followed by a severe attack of typhoid in 1929, Lakshmi Narayan became slightly deranged. The derangement gradually developed till in August 1939 Lakshmi Narayan left his house for good to seek shelter in the streets of Calcutta. This, according to Mr. Chakravartti, is sufficient to bring the case within Order 32, Rule 15, Civil P. C., which does not require proof of absolute insanity but only proof of mental infirmity which rendered Lakshmi Narayan incapable of protecting his own interests. Mr. Mukherjee appearing for defendant 3 has argued that the abandonment of the protection of home by Lakshmi Narayan in August 1939 was not the result of insanity but the result of the ill-treatment of his son, the plaintiff and he has placed strong reliance upon the admission made by the plaintiff in his cross-examination to the effect that after the disappearance of his father, the plaintiff did not care to inform the police or to advertise in the newspapers. Mr. Mukherjee has also strenuously argued that the plaintiff adduced no evidence about the mental condition of his father during the period of two years and six months which elapsed between Lakshmi Narayan's disappearance and his death and as such the plaintiff is not entitled to succeed. The story of ill-treatment by the son was alleged by defendant 1 in his written statement in para. 13 and was adopted by defendant 3. It runs as follows :

"For some time past Lakshmi Narayan Mukherjee being disgusted with the maltreatment at the hands of the plaintiff began to live separately from the plaintiff with his concubine at, different places and the plaintiff as also the acquaintances of Lakshmi Narayan Mukherjee had all along been in the know of his whereabouts".

Defendant 1 has examined himself as D. W. 2 and in his evidence in Court he does not venture to prove any of the scandalous allegations made in the written statement. On the other hand, D. W. 2 has stated in his evidence that after his retirement Lakshmi Narayan started a cloth shop at Naihati which again is not alleged in the written statement. The only witness who comes forward to prove the story of quarrel between the father and the son, is D. W. 3, Kunjalal Ghose who is brother of defendant 1's tenant and who filed an application for insolvency for his business dealings and who became a zemindar in 1942 after his father's death. We are not at all impressed by the uncorroborated testimony of this witness. We are now left with the omission of the plaintiff to inform the police and advertise in the papers. There may be various motives for not informing the police and not advertising in the press, for example a natural shyness standing in the way of ventilating one's private troubles in the press or before the police. We are not prepared to hold upon these materials that the plaintiff was guilty of ill-treatment of his father to such an extent that his father was compelled to leave the house. Moreover, the story of ill-treatment was not suggested to the plaintiff in his cross-examination.

8. That Lakshmi Narayan did not completely recover from the effect of typhoid, will appear from the fact that he was on sick leave for about three years from

1929 and that he retired from service in 1932, at least two years before his retirement was due. From the order sheet of Title Suit No. 52 of 1940 which is Ex. 6 in the case, we find that on 14th November 1940 the mortgagee who was a resident of Naihati and as such expected to know everything about Lakshmi Narayan filed an application praying for substituted service of summons upon him, on the allegation that Lakshmi Narayan was trying to avoid summons and this application was granted. On 9th December 1940, as soon as the substituted service of summons had been effected at the last known residence of Lakshmi Narayan, Amulya Ratan filed his application Ex. A alleging that his father had disappeared from home on 5th August 1939 in a fit of insanity and praying for being appointed the guardian ad litem of his father. On that date, there was absolutely no motive for making that application on false allegation as it was not necessary for Amulya to make any application whatsoever. There is a ring of truth in this application which we cannot overlook. The absence of evidence about the mental condition of Lakshmi Narayan from August 1939 to February 1942 is quite natural in the circumstances of this case and we are entitled to infer that the same mental infirmity which prompted Lakshmi Narayan to leave his house in 1939 continued till he met with his death in February 1942. Mr. Mukherjee has further invited attention to Exs. 3 and 3 (a) which are two letters written by Lakshmi Narayan to the Chairman, Naihati Municipality. They undoubtedly show that Lakshmi Narayan was in full possession of his senses but they are dated 8th June 1939. In the case of a man who is suffering from insanity or mental infirmity, it is well known that he sometimes has lucid intervals during which he behaves like ordinary individuals. We are disposed to think that those letters were written during those lucid intervals. On a comparative estimate of the circumstantial evidence we are inclined to accept the plaintiff's argument that Lakshmi Narayan's disappearance in August 1939 was the result of a mental infirmity which rendered him incapable of protecting his own interest and as such required protection under Order 32, Rule 15, Civil P. C. The learned subordinate Judge misdirected himself in proceeding upon the view that in order to succeed in this suit, it was necessary for the plaintiff to prove that Lakshmi Narayan was absolutely insane. He lost sight of the second alternative provision in Rule 15 which is sufficiently wide to cover a case of this description.

9. In the background of these circumstances, we have to consider the oral evidence adduced by the parties. The plaintiff has examined as many as six witnesses besides himself to prove various details which go to indicate that Lakshmi Narayan was suffering from mental infirmity. Here again, it is necessary to bear in mind that the plaintiff is not required to prove that Lakshmi Narayan was absolutely insane but only that Lakshmi Narayan was suffering from such mental infirmity as rendered him unfit to protect his own interest. The witnesses on this point are P. Ws. 3, 6, 7, 8, 9, 10 besides the plaintiff who is P. W. 1. There can be no doubt that these witnesses are competent to speak about the mental condition of Lakshmi Narayan being either his friends or neighbours. With regard

to P. W. 3 the learned subordinate Judge says that he does not prove anything; we find that he says that Lakshmi Narayan did not answer questions, used to remain silent and if any one asked any questions he became violent; and rude to him and that he used abusive language without any apparent reason -- this may not be evidence of absolute insanity, but it is certainly good evidence of mental infirmity. The same remark applies to the evidence of P. Ws. 6, 8 and 9 ; but the most important of witnesses on this point are P. W. 7, Ashutosh Bhattacharjyee and P. W. 10, Kabiraj Nagendra Bhusan Roy. The former is a close neighbour of Lakshmi Narayan and besides being a graduate in law he belongs to a highly respectable family. This witness was disbelieved by the learned Subordinate Judge on the ground that the plaintiff was his family physician. We are unable to take this view. It is impossible for us to hold that a man of the education and social standing of P. W. 7 could perjure himself for his family physician. P. W. 7 proves that if Amulya's patients came to call him, Lakshmi Narayan went to assault them and if the witness asked Lakshmi Narayan about his son, the reply was that Amulya was playing on the verandah. Similarly Kabiraj Nagendra Bhusan Roy proves that Lakshmi Narayan used to talk incoherently and when he was asked about his diet he gave an incoherent answer. We do not see why we should discard this evidence. The trial Court says that the evidence of this witness does not show that Lakshmi was at any time treated for insanity, but that is no ground for rejecting his testimony on the facts proved by him. As against this evidence of the plaintiff, the only witnesses examined by the defendants are D. W. 1 who is the husband of the mortgagee, D. W. 2 who is the auction-purchaser and D. W. 3 who is the brother of the auction purchaser's tenant. Needless to say that we are not disposed to place any reliance upon the evidence of these interested witnesses. It is to be noticed that the mortgagee, the auction-purchaser and all the witnesses examined by the defendants in this case are residents of Nalhati and Lakshmi Narayan appears to have been known to them for a pretty long time. In these circumstances the failure of the defendants to produce any independent witness in support of their case also indirectly supports the plaintiff's version.

10. A dispassionate consideration of the details proved by the witnesses for the plaintiff leads us to the conclusion that the oral evidence on the side of the plaintiff fits in with the circumstances and probabilities of the case and proves beyond reasonable doubt that Lakshmi was certainly suffering from mental infirmity which tendered him incapable of protecting his own interest, and when on top of all this, we find that Lakshmi Narayan left home for good to meet with his death three years later in the streets of Calcutta, we have hardly any doubt that his mental infirmity developed into something bordering on insanity. Instead of taking each item of evidence separately and trying to explain it away on some untenable hypothesis, the learned Subordinate Judge should have tried to ascertain the cumulative effect of the circumstantial details proved by the plaintiff. We are further of the opinion that the learned Subordinate Judge's estimate of the oral evidence was vitiated by a wrong view of the requirements

of Order 32, Rule 15, Civil P. C. Our conclusion, therefore, is that though Lakshmi Narayan's representation was necessary under Order 32 Rule 15, Civil P. C., in Title Suit No. 52 of 1940, he was not, in fact, represented by a guardian ad litem.

11. The next question is what is the result of this non-representation. Mr. Chakravartti cited before us the case of *Mt. Rashid-un-nisa v. Muhammad Ismail Khan* 361 A 168: 31 ALL 372 PC where the Privy Council pointed out that an objection as to non-representation is not one falling u/s 47, Civil P. C., and cannot be raised in any execution proceeding inasmuch as the party not represented cannot be deemed to be a party to the suit. It follows from this decision that a decree obtained without representation in a case where representation is necessary must be regarded as a decree against a person not a party to the suit and is therefore without jurisdiction and void. This, however, is a case of non-representation of a minor. The same principle was applied to the case of a lunatic in the case of *Hakimullah and Another Vs. Nobin Chandra Barua*, and by a Division Bench of the Allahabad High Court in the case of *Bhondul Mal Vs. Thomas Skinner*. Our conclusion, therefore, is that the ex parte decree obtained by Kanak Nalini against Lakshmi Narayan in Title Suit No. 52 of 1940 was null and void.

12. The last point raised by Mr. Mukherjee is that defendant 1 is a bona fide stranger purchaser at the auction sale held in execution of the decree in Title Suit No. 52 of 1940 and defendant 3 is a purchaser from defendant 1. In these circumstances, the auction sale cannot, according to Mr. Mukherjee, be set aside even if the decree be found to be void. For this proposition Mr. Mukherjee has relied upon the case of *Chunder Kant v. Bissesar Surmah* 7 WR 312, *Rewa Mahton v. Ram Kishen Singh* 13 IA 106 : 14 Cal 18 PC, *Nawab Zain-ul-Aldin Khan v. Muhammad Asgar Ali Khan* 15 IA 12 : 10 ALL 166, *Khizarajmal v. Diam* 32 IA 23 : 32 Cal 296. The principle that a bona fide purchaser who is a stranger to the decree does not lose his title to the property on account of the subsequent reversal or modification of the decree is firmly established and cannot be questioned. In the case of *Zain-ul-Abdin*, Sir Barnes Peacock in delivering the judgment of the Board observed as follows:

"It appears to their Lordships that there is a great distinction between the decree-holders who came in and purchased under their own decree, which was afterwards reversed on appeal, and the bona fide purchasers who came in and bought at the sale in execution of the decree to which they were no parties, and at a time when that decree was a valid decree, and when the order for the sale was a valid order." The last portion of this passage makes it clear that in order to bring a case within this principle one of the conditions that must be fulfilled is that the purchase must be at a time when the decree was a valid decree and the order for sale was a valid order. The case of *Chunder Kant v. Bissesar Surmah* 7 WR 312, also illustrates the same principle in the following passage :

"If a sale takes place in execution of a decree in force and valid at the time of sale, the property in the thing sold passes to the purchaser."

In *Rewa Mahton v. Ram Kishen Singh* 13 IA 106 :14 Cal 18 , the property was sold to a bona fide purchaser at an auction sale held in execution of a decree at a time when the judgment-debtor held another decree for a higher amount against the person who brought the property to sale. The question arose whether an execution levied under these circumstances was a nullity in view of the provision of Section 246 of the Code of 1882 (corresponding to Order 21, Rule 18 of the present Code). Sir Barnes Peacock held that the execution was not a nullity and the auction purchaser was protected and observed as follows:

"If the Court has jurisdiction a purchaser is no more bound to inquire into the correctness of an order for execution than he is as to the correctness of the judgment upon which execution issues."

In another passage, it is said that a purchaser under a sale in execution is not bound to inquire whether the judgment-debtor had a cross judgment for a higher amount any more than he would be bound in an ordinary case, to inquire whether a judgment upon which execution issues has been satisfied or not. In *Khیارajmal v. Diam* 32 IA 23 :32 Cal 296 Lord Davey made the following observation at p. 33.

"The Court had no jurisdiction to sell the property of persons who were not parties to the proceedings or properly represented on the record. As against such persons, the decree and sales purporting to be made would be a nullity and might be disregarded without any proceeding to set them aside."

Mr. Mukherjee strongly argued that in *Khیارajmal's* case 32 IA 28 : 82 Cal 296, their Lordships of the Judicial Committee took care to point out that they were dealing with a case where the real purchaser was the judgment-creditor and drew our pointed attention to the following sentence:

"Their Lordships are quite sensible of the importance of upholding the title of persons who buy under a judicial sale; but in the present case the real purchaser was the judgment-creditor, who must be held to have had notice of all the facts."

In our judgment, this passage does not in any way limit or modify the general principle enunciated in the earlier part of the judgment to the effect that if a person is not represented in law or in fact in a suit, the sale of his property is without jurisdiction and is null and void. The difference in the rights of an auction purchaser in a case where the execution is merely irregular and a case where the execution is altogether void is illustrated by the two cases of *Malkarjun v. Narhari* 27 IA 216 :25 Bom 337 and *Khیارajmal v. Diam* 32 IA 23 :32 Cal 296. In the former case the order for sale was held to be merely irregular and the purchaser was protected. In the latter case, the execution and also the sale were held to be void. As in the case before us we have come to the conclusion; that the ex parte decree obtained against Lakshmi Narayan was void ab initio on account of the absence of representation of Lakshmi Narayan we hold that all the subsequent proceedings in execution including the auction sale were also void and the plea of bona fide purchase is not available to defendant 1 or to defendant 3.

13. The result is that this appeal is allowed. The judgment and the decree of the Court below are set aside and the plaintiff's suit is decreed with costs.

14. The plaintiff will recover his costs of the trial Court from all the defendants and the costs of this Court from defendants 2 and 3 who appeared to contest the appeal. The plaintiff will get a declaration that the decree passed in Title Suit No. 52 of 1940 and the execution proceeding and sale in connection there with are not binding against him and that the title of the plaintiff has not in any way been affected by the said decree and sale and the said mortgage suit stands revived.

G.N. Das, J.

I agree.