(1934) 06 CAL CK 0013

In the Calcutta High Court

Corporation of Calcutta APPELLANT

Vs

Kumar Arun Chandra Singh and Others RESPONDENT

Date of Decision : 05-06-1934

Acts Referred:

Citation : AIR 1934 Cal 862 : 153 Ind. Cas. 972

Hon'ble Judges : Lort-Williams, J;Costello, J

Bench : Division Bench

Judgement

Lort-Williams, J.—In this suit, the Corporation of Calcutta claimed Rs. 134-4-9 on account of consolidated rates payable in respect of premises No. 2, Payari Das Lane, Calcutta, which are part of a debutter property of which defendant No. 1 is the shebait, defendant No. 2 a lessee, and defendant No. 3 a mortgagee of defendant No. 2. The defence of defendant No. 1, who alone contested the suit, was that the Corporation''s claim arose by reason of a statutory charge created under the provisions of Section 205, Calcutta Municipal Act, that it had similar charges over other properties belonging to the same defendant, for the enforcement of which it had brought five other suits, four of which had been decreed by consent, and that by reason of the provisions of Section 67A, Transfer of Property Act, the Corporation must enforce all such charges in one suit. Section 205, Calcutta Municipal Act, provides:

The consolidated rates due from any person in respect of any land or building shall, subject to the prior payment of the land revenue (if any) due to the Government thereupon, be a first charge upon the said land, or building and upon the movable property (if any) found within or upon such land or building and belonging to the said person.

2. Section 67-A, Transfer of Properly Act, provides:

A mortgagee who holds two or more mortgages executed by the same mortgagor in respect of which, he has the right to obtain the same kind of decree u/s 67 and who sues to obtain such decree on any one of the mortgages, shall, in the absence of a contract to the contrary, be bound to sue on all mortgages in respect of which the mortgage money has become due.

3. Section 100, Transfer of Properly Act, provides:

Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such, charge.

4. The learned Judge (McNair, J,) decided in favour of the defendants, except with regard to that part of the claim which referred to rates which became due prior to April 1, 1930 when Section 67-A came into force. As regards the rest of the claim he held that the suit was incompetent and dismissed it. The Corporation has appealed against this decision. In the first place, the Corporation draws attention to the serious inconvenience which would or might arise if the decision were correct. The Corporation before making any claim for rates, would have to make sure in every case whether the defendant or defendants had any other properties within the Municipal area, which were subject to similar charges, and if they had, would have to ascertain further whether they were within the same jurisdiction, because the Municipal area lies within the jurisdiction of more than one Court. The statutory charge applies to both movables and immovables, and to both owners of movables and immovables and occupiers and sub-tenants and purchasers (Sections 199, 200, 205, Calcutta Municipal Act). The inclusion of such various and over-lapping rights and obligations in one suit would or might lead both to confusion and hardship. ''Nevertheless, these considerations would have little weight, if the words of the statute and the intention of the legislature were clear and unambiguous. The Court would be obliged to give effect to them in spite of the consequences. Section-67-A'', Transfer of Property Act, is one which restricts the rights of mortgagees and therefore must be construed strictly. (Maxwell''s Interpretation of Statutes Edition 7, page 215). The section seems to have been thrust into the Act without due consideration of its effect upon other sections, for example, Section 100. Presumably it was intended as a benefit to mortgagors. This may be so, when there is more than one mortgage on the same property and they are liable to foreclosure. But the section has been drawn wide enough to include mortgages on different properties which are liable only to sale, and it is difficult to appreciate how it can benefit a mortgagee to have to meet demands in respect of all such obligations at one and the same time.

5. Section 100, Transfer of Property Act, purports to deal primarily with the incidence of the security, and not with the method of enforcing it, and declares that the provisions therein before contained which apply to simple mortgages, shall apply to charges only "so far as may be." That all the provisions there in before contained do not apply to charges and that Section 100 was not intended to apply to some statutory charges was decided in Fatick Chunder v. Foley 15 C. 492. It is not easy to understand why charges created by operation of law have

been included within the provisions pf Section 100. But for the fact that there are some other sections in the Act which refer to such charges, one would have thought that they had been included by inadvertence because the Transfer of Property Act, 1882, is "an act to amend the law relating to the transfer of property by act of parties." This is expressly stated, also in the preamble, and where the enacting part of a statute is ambiguous, the preamble can be referred to, to explain and elucidate it: Raj Mal V. Harnarh Singh 104 Ind. Cas. 661 : AIR 1928 Lah. 35 : 9 L. 260 : 28 P.L.R.595, Citing Deo v. Brandling (1828) 7 B. & C. 643, Fellows v. Clay (1843) 4 R.B. 313, and Sussex Peerage case (1844) 11 Ch. & F 85. In Powell v. Kempton Park Race Course Co. (1899) A.C. 143 Lord Halsbury said:

Two propositions are quite clear, one that a preamble may afford useful light as to what a statute intends to reach and another that if an enactment is itself clear and unambiguous, no preamble can qualify 6r cut down the enactment.

6. Careful examination of the terms of Section 67-A makes clear, in my opinion, that it was not intended to apply to securities created by operation of law such as statutory charges, but only to consensual securities which are created by act of parties. Thus it applies to "mortgages executed by the same mortgagor," and provides that certain obligations shall arise "in the absence of a contract to the contrary." Both terms are inappropriate to a statutory charge. And even if it were arguable that the first refers only to mortgages, and may be ignored because Section 100 applies be the other provisions of the Act to charges only "so far as may be" yet the power, of contracting out is clearly an essential part of the section and could not be given effect to in a statutory charge, unless the particular statute so provided which is not so the present case. Moreover, the language of the section is inappropriate in other respects to a statutory charge such as that created by Section 205, Calcutta Municipal Act. This comes into being for the first time when the rates become due, whereas Section 67-A clearly contemplates a security which is already in existence at the time when the "mortgage money has become due." It is true that the logical result of this construction of Section 67-A is that Section 67 also, which contains the same words "in the absence of a contract to the contrary," does not apply to securities created by operation of law, and thus the owners of such cannot avail themselves of the benefit of the provisions therein contained. But the Act was not intended to be exhaustive, and does not profess to be a complete Code Satyabadi v. Harabati 34 C. 223 : 5 Cri.L.J. 192, and does not deal with the transfer of movables, or charges upon movables, such as are referred to in Section 205, Calcutta Municipal Act. In any case not covered by the Act the Court is entitled to apply rules of English Law which are not inconsistent with the Act, Mayashankar Mulshankar Vs. Burjorji Meewanji Batlivala, , and the holder of a statutory charge is entitled to a decree for sale. For all these reasons, I entertain no doubt that Section 67-A does not apply to statutory charges created under the provisions of Section 205, Calcutta Municipal Act.

7. The result is that the decree must be modified. There will be a decree instead for Rs. 134-4-9 against all the defendants with costs, a declaration that the Corporation has a first charge on the premises No. 2, Payari Das Lane, Calcutta, for this sum with interest at 6 per cent, and a decree under Order XXXIV, Rule 4, Civil Procedure Code, in Form No. 5-A in Appendix D to Schedule I thereto as amended by Act XXI of 1929, and this appeal is al lowed with costs.

Costello, J.

8. I agree.

Lort-Williams, J.

9. Appeal from original decree No. 103 of 1933.--For the reasons given in Appeal No. 102 of 1933 the decree in this suit also must be modified. There will be a decree instead for Rs. 355-5-9 against all the defendants with costs, a declaration that the Corporation has a first charge on the premises No. 92, Upper Chitpore Road, Calcutta, for this sum with interest at 6 per cent, and a decree under Order XXXIV, Rule 4, Civil Procedure Code, in Form No. 5-A in Appendix D to Schedule I thereto, as amended by Act XXI of 1929, and this appeal is allowed with costs.

Costello, J.

10. I agree.

