
(1958) 08 CAL CK 0015
In the Calcutta High Court
Case No : A.F.A.O. No. 58 of 1956

Ganesh Chandra Chakravarty	Vs	APPELLANT
Kalna Town Credit Co-operative Bank		RESPONDENT

Date of Decision : 12-08-1958

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 34 Rule 10, Order 34 Rule 2, Order 34 Rule 3, Order 34 Rule 4, Order 34 Rule 5

Citation : AIR 1959 Cal 624 : 63 CWN 85 : (1959) 2 ILR (Cal) 503

Hon'ble Judges : B.N. Banerjee, J

Bench : Single Bench

Advocate : Hem Chandra Dhar and Ganganarayan Chandra, for the Appellant; Radha Kanta Mukherjee and Jnanendra Mohan De, for the Respondent

Final Decision : Allowed

Judgement

B.N. Banerjee, J.—Ganesh Chandra Chakravarty, the appellant in this appeal, is a subsequent mortgagee decree-holder. Kalna Town Credit Co-operative Bank (herein after referred to as the "Bank") was a prior mortgagee of the self-same property, which was subsequently mortgaged to Ganesh Chandra Chakravarty. It appears that the Bank instituted a suit in enforcement of the mortgage in its favour but did not make Ganesh, the subsequent mortgagee, a party defendant in that suit. The Bank obtained a decree and in execution of the decree itself auction purchased the mortgaged property,

2. In the suit filed by Ganesh, in enforcement of the mortgage in his favour, the mortgagors and the prior mortgagee, the Bank, were all made defendant. In the aforesaid suit a sum of Rs. 1800/- was found due and owing to Ganesh by way of principal and interest and there was a preliminary decree for sale passed in favour of Ganesh with costs. The Bank preferred an appeal, being Title Appeal No. 160 of 1951, against the decree. The appeal was dismissed on 6-8-1954, and the preliminary decree for sale was affirmed with costs. I quote below the material portion from the decree passed in appeal;

"It is ordered that the appeal be and the same is hereby dismissed on contest with costs to the plaintiff-respondent No. 1 and ex parte without costs against the rest. The judgment and the decree of the learned Munsif are hereby affirmed.

The costs of this appeal, as detailed below, amounting to Rs. 137-14-3p (Rupees one hundred thirty seven, annas fourteen and pies three only) are to be paid by the appellants to the respondent No. 1.

The costs of the original suit amounting to Rs. 309-12-9 pies (Rupees three hundred nine, annas twelve and pies nine) are to be paid by the defendants 1. 2, 3, 6 and 7 to the plaintiff."

The defendant No. 2 referred to above was the Bank.

3. After the preliminary decree had been affirmed in appeal there was a final decree passed, on 6-5-1954. The mortgage security was sold in enforcement of the final decree but the sum of money realised was not sufficient to satisfy the costs.

4. The present execution case, being Mortgage Execution Case No. 3 of 1955, was filed on 31-1-1955. The purpose of the execution is realization of costs decreed by the Trial Court when the preliminary decree was passed as also costs decreed in appeal, when the preliminary decree was affirmed.

5. The amount claimed is Rs. 447-11-0 comprising of a sum of Rs. 309-12-9 as costs of the preliminary decree and Rs. 137-14-3p as costs of appeal. The amount was sought to be realised by attachment of certain sums" of money lying to the credit of the Bank in another proceeding.

6. The Bank filed an objection, u/s 47 of the Code of Civil Procedure, in the execution case aforesaid and the stand taken by the Bank was that it was not personally liable to pay costs and the remedy of the decree-holder, if any, was against the property mortgaged.

7. The learned Munsif upheld the objection and dismissed the execution case. The order was affirmed in appeal, preferred by the decree-holder Ganesh, by the Court of Appeal below.

8. In dismissing the appeal the Court of Appeal below observed as follows:

"One accredited view is certainly to the effect that every thing would depend upon construction of the terms of the decree which awards the costs and if a personal liability is created the execution court will give effect to the same and will not compel the decree-holder to exhaust his remedies against the charge. The real difficulty is, however, created by the mandatory provisions of Order 34, Rule 10, C. P. C., which does not seem to have been placed before Their Lordships in any of the reported decisions. Order 34, Rule 10, C. P. C., provides as follows: "In finally adjusting the amount to be paid to a mortgagee in a case of a foreclosure sale or redemption, the court shall add to the mortgage money such costs of the suit and other costs". The use of the

word "shall" is significant. It excludes all discretion to create any personal liability in respect of costs independent of the charge. The decision of the learned Munsif is thus well grounded in law and I am unable to interfere with it."

9. This second miscellaneous appeal is directed against the order passed by the Court of Appeal below.

10. I am of opinion that the learned District Judge was not right in his conclusion. An order for costs in a mortgage suit is, as a rule, part of the mortgage decree and the decree-holder is required to proceed against the mortgaged properties, in the first instance, for recovery of such costs before he can proceed against the mortgagor personally. The general rule is to add the costs of the suit to the mortgage security. This is the law as appears from the Rules 2, 3, 4 and 5 of Order 34 of the Code of Civil Procedure. Rule 10 of Order 34 of the CPC provides that the Court shall add to the mortgage money such costs of the suit and other costs and charges and expenses incurred by the mortgagee since the date of the preliminary decree unless the mortgagee has, by his conduct, disentitled himself to the costs.

11. But although that is so, a Court has still the jurisdiction to make in appropriate cases an order for costs in a mortgage suit which shall be recoverable otherwise than from the mortgaged property. In this view I am fortified by a judgment of a Division Bench of this Court reported in *Lalit Mohan Dutt Vs. Krishnadhon Bandopadhyaya, , Biswas J.*, observed as follows:

"It is permissible still to point out that the right and discretion of the Court to make an order for "costs personally against the mortgagor is as much part of the general law as that which requires costs to be added to the security. The mere absence of words that the decree is made personally against the mortgagor is, in our opinion, not at all conclusive. Apart from such words, there might yet be sufficient indications in the terms of the decree itself and in other circumstances of the case to show that a personal decree was intended."

12. The above observation was made after considering Rules 2, 3, 4 and 5 along with Rule 10 of Order 34 of the Code of Civil Procedure. The aforesaid decision was not considered by the learned District Judge and he, therefore, made the erroneous observation that in none of the reported decisions the effect of the mandatory provisions of Order 34, Rule 10 of the CPC had been considered.

13. The next question is whether in the decree, that was passed in Title Appeal No. 160 of 1951, there is anything to indicate that costs were directed to be paid by the Bank personally. I have hereinbefore quoted the material portion of the aforesaid decree. There is nothing to indicate in the said decree that the costs either of the suit or of the appeal were directed to be added to the mortgage money. I interpret the decree to mean that costs of the suit were payable by the Bank itself along with some other defendants; costs of the appeal were payable by the Bank alone. None of these costs were made recoverable out of the mortgage security.

14. Mr. Radha Kanta Mukherjee argued with great emphasis that such decrees should not have been made in the instant mortgage suit and appeal. That may be so or may not be so. I need not decide the point. This question has been raised at the execution stage, and at this stage what I am to see is not what decree the Court ought to have passed but what decree was in reality passed.

If the Bank was aggrieved by the direction as to costs made in the decree in Title Appeal No. 160 of 1951 it should have appealed against the said decree and should have tried to get the direction as to costs suitably varied. Not having done that, the decree in Title Appeal No. 160 of 1951 is now binding on the Bank.

15. In the view that I take of this matter, I set aside the judgment and order passed by both the Courts below. The execution case shall now be revived and proceed from the stage it reached.

16. This appeal is, therefore, allowed with costs. The hearing in this appeal has been some what lengthy. There was one hearing at first and on the prayer of the learned Advocate for the appellant a further hearing was granted. Considering all these matters, I assess the hearing fee at three gold mohurs.