
(1915) 06 CAL CK 0009
In the Calcutta High Court

Giriraj Kanta Chakrabutty and Others	APPELLANT
Vs	
Mohim Chandra Acharjya	RESPONDENT

Date of Decision : 02-06-1915

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47
Transfer of Property Act, 1882 — Section 44

Citation : 35 Ind. Cas. 294

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

Bench : Division Bench

Judgement

1. This is an appeal by the defendants in a suit for possession of land and huts on declaration of title by purchase at a sale in execution of a mortgage-decree. The facts essential for the decision of the questions of law raised before us may be briefly stated. Three brothers A, B and C, were owners of the disputed property, and their interest may be regarded as the unit for our present purpose. On the 18th December 1887, A and B executed a mortgage in favour of the plaintiff; they dealt with the entire property and apparently ignored the interest of their brother C. A died in 1892 and left his two brothers B and C as his representatives. On the 30th November 1895 the mortgagee sued B and C to enforce his security. B was made a party in his character as one of the original mortgagors, and also as one of the representatives of A; C was described only as the representative of his deceased brother A. There was no allegation in the plaint that the mortgage, though executed by A and B, was operative against C, either because the debt had been incurred for family purposes or because A and B had implied authority to bind their brother C. Neither B nor C entered appearance and an ex parte decree was made on the 19th December 1895. The decree was executed in due course, the property was brought to sale and passed into the hands of the plaintiff. The plaintiff as execution purchaser obtained symbolical delivery of the property, but not actual possession. He accordingly instituted the present suit on the 6th August 1907 to eject the defendants who are the representatives of B and C, as C had died in 1898 and B in 1901. The Court of

first instance decreed the suit in part. Upon appeal the Subordinate Judge has decreed the claim in full. On the present appeal, four points have been urged on behalf of the defendants, first, that the suit was barred u/s 47, Civil Procedure Code, and that the remedy of the plaintiff was by way of an application to the execution Court to be placed in actual possession of the purchased property; secondly, that the defendants are at liberty to impeach the ex parte decree as fraudulently obtained and consequently inoperative; thirdly, that the defendants are not bound by the doctrine of res judicata and are entitled to establish that the plaintiff has acquired title, if at all, to only two-thirds share of the property, that is, only to the interest of the two mortgagors A and B; and fourthly, that there should be no decree for joint possession of the huts, which are used for residential purposes by the family of the mortgagors and of their deceased brother.

2. As regards the first ground, there is plainly no substance in it. The plaintiff obtained symbolical delivery after the sale had been confirmed. That delivery was operative against the judgment-debtors, who from the date thereof became trespassers. The plaintiff can consequently sue to recover actual possession from them. This view is in accord with the decision in *Sasibhushan Mookerjee v. Radhanatk Bose* 25 Imd. Cas. 267 : 20 C.L.J. 433 : 19 C.W.N. 5 where this Court dissented from the contrary opinion expressed by the Bombay High Court in *Sadashiv Mahadu v. Narayan Vithal* 11 Ind. Cas. 987 : 35 B. 452 : 13 L.R. Bom. 661 and by the Madras High Court in *Kattayat Pathumayi v. Raman Menon* 26 M. 740 : 13 M.L.J. 237. We are accordingly of opinion that the suit as framed is maintainable.

3. As regards the second ground, it need not be disputed that, as was ruled by this Court in *Rajib Panda v. Lakhan Sendh Mahapatra* 27 C. 11 : 3 C.W.N. 660 and *Nistarini Dassi v. Nundo Lal Bose* 26 C. 891 : 3 C.W.N. 670; *Nistarint Dassi v. Nundo Lal Bose* 30 C. 369 : 7 C.W.N. 353 the defendants are competent to impeach the ex parte decree on the ground of fraud by way of defence to the claim of the plaintiff. But the answer to the contention of the appellants is that no issue was raised on this point and they cannot be permitted to attack the decree as fraudulent, when the question is not covered by any of the issues and the evidence has not been directed to the elucidation of this matter.

4. As regards the third ground, we are of opinion that the appellants have a legitimate grievance. They contend that C was made a party to the mortgage suit as a representative of his deceased brother A and that consequently the question whether the mortgage was operative against him in his personal capacity was not and could not have been raised in that litigation., There is no answer to this argument. It is besides clear from the decisions in *Jaggewar Dutt v. Bhuvan Mohan Mitra* 33 C. 425 : 3 C.L.J. 205; and *Bhaja Chowdhury v. Chuni Lal Marwari* 5 C.L.J. 95 : 11 C.W.N. 284 that the question of the validity of the mortgage as against C, who was not a party thereto, could not have been properly raised and determined in a suit to enforce the security. The position was not altered by the

circumstance that one of the mortgagors was dead at the commencement of the suit and one of his representatives was a person interested in his own right in the hypothecated property, adversely, to the mortgage. We hold accordingly that the question now in controversy, namely, was C bound by the mortgage, was not only not raised but could not have been raised in the mortgage suit as framed. The decision of this matter is thus not barred by the doctrine of constructive res judicata. On the merits, it is plain that no circumstances have been established which would justify the conclusion that the mortgage, though executed by A and B, also bound the interest of C. The inference follows that the plaintiff has acquired the interest of A and B alone and not that of C. Consequently, the plaintiff is entitled to a declaration of title to the extent of a two-thirds share exclusive of the share of C.

5. As regards the fourth ground, we are of opinion that the plaintiff, a stranger to the family, should not be placed in actual joint possession of the huts in which the defendants reside, whatever the strict rights of the plaintiff may be as purchaser of a two-thirds share of the disputed property. Section 44 of the Transfer of Property Act provides that where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in the section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house. The proper course to follow is either to direct delivery of possession by partition in execution proceedings or to leave the purchaser to his remedy by a separate suit for partition. *Kesabnath v. Har Gobind* (1853) Beng. S.D.A. 768; *Rarntonoo v. Gobind* (1857) Beng. S.D.A. 1585; *Koonwur Bijoy Keshub Rop v. Shama Soonduree Dossee* B.L.R. Sup. Vol. 172 : 2 W.R. Mis. 30; *Eshan Chunder v. Nund Coomar* 8 W.R. 239; *Futtch Bahadoor v. Jankee Bibee* 13 W.R. 74 : 4 B.L.R.55 and *Rajaniltanth Biswas v. Ram Nath Neogy* 10 C. 244. This applies with much greater force to cases under the Mitakshara Law *Kalee Pudo Banerjee v. Choitun Pandah* 22 W.R. 214 and *Kallapa v. Venkatesh Vinayak* 2 B. 676. If the contrary view were maintained, results would follow which are best described in the weighty words of Westropp, C.J., in *Balaji Anant Rajadiksha v. Ganesh Janardan Kamati* 5 B. 499 at p. 504 "it is a far safer practice, and less likely to lead to serious breaches of the peace, to leave a purchaser to a suit for partition than to place him by force in joint possession with members of a Hindu family, which may be not only of a different caste from his own, but also different in race and religion." We are of opinion that in the circumstances of this case the plaintiff should not be placed in actual joint possession of all the huts, but should be left to his remedy by a suit for partition.

6. The result is that this appeal is allowed and the decree of the Subordinate Judge discharged. The plaintiff will have a decree declaring his title to the extent of the two thirds share of the disputed land and huts which belonged to A and B, the original mortgagors, exclusive of the one-third share of their brother C who did not join in the mortgage transaction. . The decree will also declare that the plaintiff is entitled to institute a suit for partition of the property covered by the decree. Each party will pay his own costs throughout the litigation.