

(1906) 04 CAL CK 0005
In the Calcutta High Court
In Re: Hari Lall Mullick

Date of Decision : 27-04-1906

Acts Referred:

Citation : (1906) ILR (Cal) 1269

Hon'ble Judges : Woodroffe, J

Bench : Single Bench

Judgement

Woodroffe, J.—This is an application made in the insolvency of Hari Lall Mullick, who was declared an insolvent on the 29th March 1899.

2. On the 13th June 1898 the insolvent executed a mortgage in favour of Girindra Nath Bhowe to secure payment of the sum of Rs, 5,000 with interest at the rate of 15 per cent. per annum, over a one-third share of certain premises, which are described in the petition of Girindra Nath Bhowe of the 31st August 1905.

3. On the 18th January 1899 Girindra Nath Bhowe instituted a suit on his mortgage. On the 11th April, when the suit came on for final disposal, the Court ordered that, inasmuch as the mortgagor had since the institution of the suit been declared an insolvent, the hearing of the suit should be adjourned sine die. and it was ordered that Girindra Nath Bhowe and a puisne mortgagee of the name of Sarat Chandra Mitra, who makes this application, should be directed to prove their claims under their respective mortgages in the insolvency proceedings.

4. Thereafter and on the 4th August 1900 Girindra, Nath Bhowe applied in the insolvency Court for an order that he might be allowed to prove the amounts claimed in the insolvency proceedings. On that petition an order was made on the 4th August 1900 directing the matter to be set down for the following September Court day for proof of claim.

5. Thereafter and on the 4th December 1900 an order was made in the following terms:

It is ordered that the claim of the said Girindra Nath Bhowse be and the same is hereby admitted and allowed for the sum of Rs, 5,000 with interest thereon as provided in the indenture of mortgage executed by the insolvent in favour of the said creditor on the 13th June 1898.

6. It is admitted that at the date this order was made there could have been no question of the applicability of the rule of damdupat.

7. A question having arisen as to the validity of an alleged disposition by the insolvent in favour of his wife, the mortgaged property could not, it is said, be conveniently sold, until the validity of that disposition had been tested. Subsequently in a suit, which was instituted in this Court, it was held that the disposition was invalid.

8. There being then no difficulty in the way of selling the mortgage property, an application was made on the 31st August 1905 for an order in the usual terms, that the mortgaged property be sold by the Official Assignee and that the purchase money arising from the sale should be paid to the Official Assignee, who should out of the purchase money pay himself his own commission and costs, then certain costs of Girindra Nath Bhowse's attorney and after such payment, pay to the petitioner the amount of the mortgage. The petition further asks that, if the purchase money after the payment of the sums directed to be paid should not be sufficient to pay in full the amount of the petitioner's claim with interest, the petitioner might rank as a creditor with the other creditors of the insolvent for any balance that might remain due and owing to him.

9. An order was passed in terms of the petition with the consent of the Official Assignee and puisne mortgagee, Serat Chandra Mitter, but after the making of the order the petitioner, Girindra Nath Bhowse, came to learn that the insolvent had executed another mortgage in favour of one Kedar Nath Ghose. Thereupon and on the 5th September 1905 he applied for an order that his petition of that date might be read as part of his petition of the 31st August 1905, and that the order made thereon be drawn up as made with the consent of the mortgagee Kedar Nath Ghose and be dated as of that date.

10. An order therefore for sale of these properties was ultimately made with the consent of the Official Assignee and of the first hand all puisne mortgagees. Nothing whatever was said at that time as regards the applicability of the rule of damdupat to the claim.

11. When, however, the order came to be drawn up and the draft was circulated, an objection was taken on behalf of the puisne mortgagee, Sarat Chandra Mitter, to the form of the proposed order, in that it did not make the first mortgagee's claim subject to the rule of damdupat, which the puisne mortgagee contended was applicable. This proposed alteration of the order was not assented to by the first mortgagee, nor by the Official Assignee, who stated that the proposed alteration in reference to the rule of damdupat appeared to him to be untenable. Thereafter and on the 26th April 1905 a petition was filed by the puisne

mortgagee, Sarat Chandra Mitter, which is the matter now before me.

12. In that petition this puisne mortgagee submits that the rule of damdupat applies to the first mortgagee's claim and the petitioner prays to speak to the minutes of the said order in respect of this matter and in the alternative that, if the Court be of opinion that the order, which the petitioner seeks, cannot be obtained by speaking to the - minutes, then for an order that the said order of the 5th September 1905 be amended by inserting such words therein as would have the effect; of making the claim of Girindra Nath Bose, the first mortgagee, subject to the rule of damdupat.

13. The question, therefore, before me now is whether or not the claim of the first mortgagee is under the circumstances of this case subject to that rule.

14. In the first place, it is to be observed that the Insolvent Act was passed in the year 1848 and it has now been in force for a period exceeding half a century. Innumerable orders have been passed on proof of claims made in respect of mortgages, as also orders of sale by the Official Assignee of property mortgaged by the insolvent. In an affidavit, which has been filed on behalf of the first mortgagee, his attorney states that the rule of damdupat has never been applied to his knowledge in insolvency proceedings. The affidavit sets out that on enquiry made of the Official Assignee as to the practice prevalent in his office in respect of sales of mortgaged properties, the Official Assignee states that the practice of his office is to sell the mortgaged properties pursuant to the terms of the order of the Court, that then subsequently prior to payment of the mortgage claims an account is taken of the amounts due on the respective mortgages, calculated on the basis of the mortgage deeds. The Official Assignee states that he has never known the rule of damdupat to have been applied in cases of sales of mortgaged property by the Official Assignee. Indeed, it has been admitted before me by learned Counsel, who have argued the matter, that there is no instance known to them in which the rule of damdupat has been applied in insolvency proceedings in such a case as this. I think that the circumstance that during a period of over half a century, no such question has been raised as has been argued before me, is in itself evidence against the contention now put forward. I do not propose to disturb in any way the practice, which has so long prevailed, unless there are cogent reasons shown to me establishing that that practice is illegal. I may here state that the matter is one of simple practice, there being no statutory provision either in the Insolvent Act or any rule dealing with sales of mortgaged property by the Official Assignee.

15. The first objection, which has been taken to the application, is that the consent given to the orders made on the applications of the 31st August and 5th September 1905 precludes the applicant, who was a consenting party to those orders, from raising the present contention. I do not think, however, that there is any thing in this objection. If the rule of damdupat does not apply to such a case as this then the question of consent or no consent is immaterial. If on the other hand that rule would ordinarily apply, then even assuming that it were possible

that the applicant could by consent contract himself out of that rule, I do not see any reason for supposing that he did in fact do so.

16. I am rather inclined to think that the question, which is now argued, was not in the minds of either of the parties at the time. Probably it occurred to the mind of the petitioner, when it was found that, unless he could establish that the rule of damdupat was applied to the first mortgagee's claim, he would get nothing on his.

17. I think that the effect of the consent was this: That the applicant consents to the first mortgagee obtaining that which the law allowed him to set.

18. The question then is, whether the rule of damdupat applies to his claim. It has been contended on his behalf that it is not so applicable.

19. In the first place, objection is taken which, if sustainable, goes to the root of the whole matter.

20. It is contended on the authority of the case of *Madhwa Sidhanta v. Venkataramanjula* I.L.R.(1903) Mad. 662 that the rule of damdupat is inapplicable to mortgages governed by the Transfer of Property Act. Next, that if the rule of damdupat is applicable to the mortgages executed after the Transfer of Property Act, it is a personal privilege of the debtor and that it cannot be given effect to, at the instance of a third party and when the property of the debtor becomes vested in the Official Assignee, who is now the owner of the equity of redemption. It is broadly contended that the rule has no application in insolvency proceedings, or at any rate, after an order has been made admitting the creditor's claim.

21. It is not necessary for me to consider any of these contentions, except the last one, which, I think, must prevail.

22. u/s 352 of the Civil Procedure Code, a declaration u/s 351 is deemed to be a decree in favour of each of the creditors for their respective debts, and I think that the order of the 4th December 1900 also amounted to a decree. That it was in effect a decree has not been contested, but it is said that it was not a final decree in that the amount payable to the mortgagee was not stated in that order.

23. It appears, however, to me that the effect of the order admitting the first mortgagee's claim of the 4th December 1900, was that of a decree for principal with interest as provided for in the mortgage, calculated according to the established practice, of the Insolvency Court up to the date of payment. That practice is fully set out in the affidavit, to which I have referred.

24. The rule of damdupat only exists so long as the relation of debtor and creditor exists, but not when the contractual relation has come to an end by reason of a decree. The first mortgagee is not now claiming under his mortgage, but under the order of Court, which amounts to a decree upon that mortgage in the terms which I have stated.

25. I must therefore refuse the present application with costs.