(1943) 05 CAL CK 0012

In the Calcutta High Court

Kalidas Rakshit APPELLANT

Vs

Sm. Samrangini Roy Chowdhurani RESPONDENT

Date of Decision : 26-05-1943

Acts Referred:

Bengal Money Lenders Act, 1940 — Section 35

Citation : AIR 1945 Cal 71

Hon'ble Judges : Lodge, J;Gentle, J

Bench : Full Bench

Judgement

Gentle, J.—This is an appeal by the defendant mortgagor judgment debtor against an order made by Edgley J. on 9th December 1942. The relevant facts are as follows : On 7th April 1937 the defendant created a mortgage upon two immovable properties of which one was No. 4 Burtolla Street, Calcutta, (hereinafter called the premises). It is common ground that the provisions of the Bengal Money Lenders Act, 1940 (hereinafter called the Act) apply to the transaction. The mortgagee filed this mortgage suit in January 1939, a preliminary decree was obtained in the following March by which inter alia it was ordered that if the money realised by the sale of the mortgaged property was not sufficient for payment of the amount due, the plaintiff should be at liberty to apply for a personal decree against the defendant for the balance. The final decree was passed on 15th April 1940 for Rs. 34,202 with the usual terms regarding the sale of the hypotheca. The items of property, other than the premises, were sold and the proceeds, less expenses of sale, were paid to the mortgagee in part satisfaction of the amount due under the decree. The question of the sale of the premises then arose. In order to ascertain the reserved or specified price of the premises the Registrar obtained a report from a firm of surveyors, Messrs. Talbot & Co., who valued them at Rs. 27,000 and the Registrar fixed the reserved price or specified price at this amount. The premises were put up for sale on 14th July 1940, 30th August 1941 and 3rd January 1942. The highest bids obtained were, respectively Rs. 20,000, Rs. 21,000 and Rs. 10,000. Since these bids were less than Rs. 27,000 the premises were not sold and the Registrar adjourned (or postponed) the sale on each occasion.

2. On 12th February 1942, upon an application to Sen J. to reduce the value of the premises, the learned Judge ordered a fresh valuation to be obtained from another surveyor. Mr. C. K. Sarkar reported that the premises were worth Rs. 26,500 and the Registrar fixed the reserved or specified price at this sum. The premises were put up for sale on 22th August 1942 when the highest bid was Rs. 22,000 and as this was less than Rs. 26,500 the Registrar, for the fourth time, adjourned the sale. On 9th December 1942 upon an application to reduce the value of the premises to Rs. 20,000 Edgley J. in effect, ordered that the Registrar be at liberty to hold two further sales subject to the value of Rs. 26,500 provided that the defendant deposited within ten days with the plaintiff''s attorney the sum of Rs. 700 as the cost of such sales; if the highest bid at these two sales did not reach the above sum, or the defendant defaulted in payment of the deposit of Rs. 700, the value of the premises was to be reduced to Rs. 20,000 and the Registrar was to be at liberty to sell subject to this reduced price.

3. The appeal is against this order, the grounds being, (1) that, by reason of the provisions of Section 35, Bengal Money-Lenders Act, when the value of the premises or their specified price is once fixed the amount thereof cannot subsequently be reduced and (2) that the premises are worth more than Rs. 20,000, the value fixed by the learned Judge. On behalf of the plaintiff-respondent it was contended, (1) that no appeal lies against the order of Edgley J. and (2) that the defendant requested the learned Judge to make the order and, consequently, no appeal by him against it can be entertained. The provisions of Section 35 of the Act are as follows:

Notwithstanding anything contained in any other law for the time being in force, the proclamation of the intended sale of property in execution of a decree passed in respect of a loan shall specify only so much of the property of the judgment-debtor as the Court considers to be saleable at a price sufficient to satisfy the decree, and the property so specified shall not be sold at a price which is less than the price specified in such proclamation:

Provided that, if the highest bid for the property so specified is less than the price so specified, the Court may sell such property for such amount, if the decree-holder consents in writing to forgo so much of the amount decreed as is equal to the difference between the highest amount bid and the price so specified.

4. In the section the word "proclamation" corresponds to the word "notification" in the Original Side Rules of this Court to which reference is made below, and the words " the price specified" have the same meaning as "the reserved price " in the rules and as " the value" in the order under appeal. It was argued that, in respect of suits to which the Act applies, since the proviso to the section prohibits a property being sold for less than the specified price unless the decree-holder consents to forgo the difference between that price and the amount of the

highest bid (which contingency does not arise in the present appeal), when the specified price (or the reserved price or value) is once fixed it can never subsequently be reduced. Consequently, it was contended that the order of Edgley J. is in violation of the provisions of the section. Sales of property in suits are governed by, and conducted in accordance with, the provisions of Chap. 27 of the Original Side Rules of this Court. The relevant and material parts thereof are as follows:

3. Every such sale (sale of property by the Court) shall be to the best purchaser that can be got for the same, provided the Registrar shall consider that a sufficient sum has been offered, or in suits governed by the Bengal Money-Lenders Act 10 of 1940, provided the price to be specified u/s 35 of that Act has been reached, or the decree-holder consents in writing to forgo so much of the amount decreed as is equal to the difference between the highest amount bid and the price so specified.

6. The notification (or such portion thereof as the Registrar shall think necessary) of every intended sale by public auction under these rules shall be published in such public papers and as often as the Registrar shall direct, having regard to the nature and value of the property to be sold.

7. Every such sale shall be regulated by conditions in writing.

9. The notification shall specify the time and place of sale and shall contain description and particulars of the property, together with a statement that it is to be sold by or with the approbation of the Registrar pursuant to a decree or order of the Court, and of the manner in which it is proposed to lot the same. In suits governed by the Bengal Money-Lenders Act 10 of 1940 the notification shall specify the extent of the property to be sold and the price thereof as calculated under the provisions of Section 35 of such Act.

10. The conditions of sale shall be as few and simple as may be compatible with the nature of the property to be sold. Where the sale is subject to a reserved price, the fact of a reserved price having been fixed, but not the amount, shall be stated in the conditions.

11. The notifications, conditions, and abstract shall be left with the Registrar, and an appointment obtained from him to go through the same. Notice of such appointment shall, be served on all parties entitled to attend. At such appointment, or an adjournment thereof, the notification, conditions, and abstract shall be settled.

12. Where a sale is ordered at the instance of a subsequent incumbrancer or of a mortgagor, or where a party having the carriage of the proceedings has obtained leave to bid, unless otherwise ordered, or unless dispensed with by the proper parties, a reserved price shall be fixed by the Registrar. The Registrar may also in any other case, in which it may be deemed necessary or desirable, fix a reserved price, provided that in suits governed by the Bengal Money-Lenders Act 10 of

1940 the reserved price shall be the price specified in accordance with Section 35 of that Act.

13. For the purpose of fixing a reserved price or a price to be specified tinder the provisions of the Bengal Money-Lenders Act the Registrar may, on notice to the parties, direct a valuation or a survey to be made of the property to be sold. The same shall be made by a surveyor or other competent person, to be appointed by the Registrar, who shall certify the result under his signature, and shall deliver or transmit such certificate to the Registrar under a sealed cover. On the reserved price or price to be so specified as aforesaid being fixed, the certificate shall be put up in a sealed cover and kept with the proceedings.

14. Unless otherwise ordered, the reserved price Stall not be divulged to any person either before, at, or after the sale.

21. Where there is no bid or where the highest bid is below the reserved price (if any) or be deemed insufficient by the Registrar or in cases governed by the Bengal Money-Lenders Act 10 of 1940 where the price specified has not been reached or the decree-holder has not consented in writing to forgo so much of the amount decreed as is equal to the difference between the highest amount bid and the price so specified the Registrar shall postpone the sale, and record the reason for such postponement in his note-book.

Provided that where the highest bid is below the reserved price and where for any reason to be recorded by him the Registrar is of opinion that the same should be accepted, he may accept it subject to con firmation by a Judge.

27. Where a sale is postponed, the Registrar shall be at liberty, without further order to appoint a new day for the sale of the property, and to make any necessary alterations in the notification and conditions of sale, on notice to the parties where necessary.

28. Where a sale is postponed, or where a re-sale is directed, a fresh notification shall be issued and 1945 C/10 & 11 published and the proceedings down to the certificate of sale shall be similar to those on an original sale.

5. It is convenient to set out in chronological'' order the substance and the effect of the above rules. The sale is regulated by conditions (Rule 7) and the notification of every intended sale shall be published as the Registrar directs (E. 6) and he settles the conditions and the notification (Rule 11). In suits to which the Act does not apply a reserved price shall not be divulged (Rule 14) but when governed by the Act the notification shall specify the price as calculated u/s 35 of the Act (Rule 9). The Registrar fixes the reserved price and in suits governed by the Act the reserved price shall be the price specified in accordance with Section 35 (Rule 12). For the purpose of fixing this price, the Registrar may direct a valuation to be made by a surveyor (Rule 13); it is not obligatory for him to do so and this method is permissive but not mandatory. Every sale shall be to the best purchaser provided the Registrar considers a sufficient sum has been

offered (Rule 3); if the highest bid is below the reserved price and the Registrar is of opinion and records his reasons in writing, that it should be accepted he may accept it subject to confirmation by a Judge (Rule 21); but in suits governed by the Act a price lower than the specified price can only be accepted provided the decree-holder consents in writing to forgo so much of the amount due on the decree as is equal to the difference between the amount of the highest bid and the specified price (Rule 8 and Rule 21). If the bid is below the reserved price and the Registrar is not of opinion that it should be accepted or in suits governed by the Act the decree-holder does not consent to forgo the difference between the bid and the specified price the Registrar shall postpone the sale (Rule 21). When a sale is postponed a fresh notification shall be issued and published and the proceedings shall be similar to those of an original sale (Rule 28) and the Registrar shall be at liberty to appoint a new day for the sale and make any necessary alterations in the notification and conditions on notice to the parties (Rule 27).

6. There are two meanings for the word "sale" namely : (1) the actual exchange of the property for money and (2) the occasion when the property is offered to be sold. The proceedings in preparation for each offer to sell are separate. Each offer for sale requires a fresh notification before it can take place, the terms of which are not required to be the same as in a previous notification; and each such occasion is a separate "sale" or "offer to sell." The word'' "sale" in original sale in Rule 28 means the occasion when the property is offered for sale and the "proceedings" include the ascertainment of a reserved or specified price under Rule 13, and the fixing of such price by the Registrar under Rule 12. Although in practice, in most cases, the price in subsequent sales may be the same as in a previous sale, nevertheless the reserved or specified price is required to be ascertained and fixed upon each occasion when the property is to be offered for sale. Rule 27 permits the Registrar to make necessary alterations in the notification, which is required by Rule 9 to include a specified price. In respect of a second offer for sale in suits not governed by the Act, there is nothing which prevents the reserved price being fixed at a sum lower than that at a previously notified sale. The price may have been fixed upon inaccurate information, or subsequent to its fixation the neighbourhood in which the premises are situated may have altered so as to make them less desirable and of less value, or the property may have depreciated in value by reason of nonrepair. The existence of one of these circumstances would justify a reduction. When at any previously notified sale or sales the reserved price has not been reached this is a factor which may well reflect that the property is not worth the price subject to which it was offered to be sold.

7. Section 35 of the Act requires the proclamation (notification) of the intended sale to specify the property to be saleable at a price sufficient to satisfy the decree, and the property shall not be sold at a price which is less than that specified in such proclamation unless, by the proviso, the decree-holder forgoes the difference mentioned. ''Whilst the section prohibits the sale for less than the

price mentioned "in such proclamation" it does not provide that the price shall be the same in a second proclamation as in the first proclamation when the property has not been sold upon the first occasion when it was offered for sale on account of the specified price not being reached. There is nothing in the section prohibiting a reduction or alteration in the specified price in any subsequent proclamation.'' The words in the section, requiring the proclamation to specify only so much of the property as the Court considers to be saleable at a price sufficient to satisfy the decree, have particular application to a case where it is not necessary for the whole of the mortgaged property to be sold to discharge the mortgage debt. This provision is for the protection of the judgment-debtor and to prevent a sale of the whole of his property when disposal of a part of it will suffice. The concluding words of the section itself, that the property specified shall not be sold at a price which is less than the specified price "in such" proclamation, have general application and apply both in cases where the whole, and where a part only, of the property is to be sold. These words do no more than to prohibit the sale at a price lowes; than that specified in the proclamation by which the property is then being offered for purchase. If it was the intention that the specified price should be fixed once and for all and to prohibit a reduction, it would have been simple for this to have been expressed in the section but it has not been done. If the specified price when once fixed could not be altered or reduced then no matter how incorrect it might be or become, whether by reason of being based on incorrect information, or by a declining change in the neighbourhood in which the property is situated, or through dilapidation or non-repair, the original price would have to remain. If this price is not obtained at any sale the property could never be sold unless the decree-holder agreed to forgo the difference mentioned in the proviso to Section 35. He might not even be in a position to do this if the amount due under the decree was less than the difference between the highest bid and the specified price.

8. Reference to one of the sales is relevant upon the observations which have just been made. On 3rd January 1942, the specified price was Rs. 27,000 and the highest bid was Rs. 10,000 a difference of Rs. 17,000. At this date a sum less than Rs. 12,761 was due under the decree for principal and interest and there was a further amount for costs. If the total was less than Rs. 17,000 (as it may well have been) the decree-holder could not forgo the amount of the difference which the proviso requires of him, to enable a sale to be effected. This is apart from the unlikely event of the decree-holder being willing to agree to the property being sold when he would obtain nothing from the sale, as all the net proceeds would be paid to the judgment-debtor whose debt would be entirely discharged and the property freed from any incumbrance upon it. If a higher bid were not obtained in any subsequent sale the property could never be sold. Unless and until all the mortgaged security is sold a decree-holder cannot obtain a personal decree against a mortgagor for any unpaid balance, if in such circumstances the property were not sold the result would be that the mortgagee could never recover the moneys due to him and all his rights and claims in the

hypotheca would be taken away from him, and thus an impossible and unjust position would arise.

9. I am unable to find that there is any difference between a sale in a suit notgoverned by the Act and in a suit to which the Act applies save that the property cannot be sold for less than the specified price set out in the proclamation under which the sale of the property is then being conducted. The effect of Section 35 is to prevent the sale of more than what is required to discharge the judgment-debt, or where the whole or part of the property mortgaged is to be put up for sale and included in the proclamation such property cannot be sold on that particular occasion for less than the price specified unless the decree-holder forgoes the difference. When a sale is abortive, and the property is again offered to be sold, Section 35 does not require that the specified price shall be the same as in a previous proclamation and it does not prohibit the price being fixed at a different or a lower sum in any second or subsequent proclamation of sale of property to be sold in the suit.

10. The question of the amount of the valuation in the order under appeal now requires consideration. The highest bids obtained at the four sales which have been held varied between Rs. 22,000 and Rs. 10,000, Edgley J. fixed the valuation or price, at Rs. 20,000 which, it is contended, is too low. The learned Judge doubtless took these bids into consideration in arriving at the figure contained in his order. The valuation which he has prescribed is not the price for which the property is to be sold but the sum below which it cannot be sold; if a higher bid is obtained, it can be sold for the amount of it. Although at two sales bids in excess of Rs. 20,000 have previously been obtained, the highest bid at another sale was Rs. 10,000 and at a fourth sale the bid was for the figure at which the property has been valued. The valuation of Rs. 20,000 has not been shown as being incorrect and does not justify interference. It follows that for the reasons given this appeal must be dismissed with costs as between attorney and client. Certified for one counsel. In the light of the above conclusions, it is not necessary to consider the further matters raised in this appeal, namely, whether an appeal lies and whether in the circumstances which occurred when Edgley J. made his order the appellant is precluded from attacking it.

Lodge, J.

11. I agree.

