

(1919) 03 CAL CK 0016
In the Calcutta High Court

Kamini Kumar Roy and Others

APPELLANT

Vs

Hira Lal Pal Chowdhury and Others

RESPONDENT

Date of Decision : 14-03-1919

Acts Referred:

Transfer of Property Act, 1882 — Section 53, 67

Citation : AIR 1919 Cal 773 : 51 Ind. Cas. 736

Hon'ble Judges : Syed Shamsul Huda, J;Richardson, J

Bench : Division Bench

Judgement

Shamsul Huda, J.—The facts of the case are fully set out in the judgment of the lower Appellate Court and need only be briefly recapitulated. Plaintiffs brought a suit against the defendant No. 2 and obtained an ex parte decree in the Court of the Subordinate Judge of the 24 Pergannas. Subsequently on defendant No. 2 giving security for payment of any money that might be decreed in the suit, the ex parte decree was by consent set aside. Ultimately plaintiffs obtained a decree against the defendant No. 2 for Rs. 12,579 odd. The decree was then transferred to the Dacca Court and was executed as a money decree, and some of the properties hypothecated in the security bond and situated within that district were sold and purchased by the plaintiffs. A balance of about Rs. 7,000 was still left and the decree was then transferred to the District of Faridpur. In execution some other properties included in the security bond were sold and purchased by the plaintiffs on the 23rd of September 1913. On the 23rd of April 1914 plaintiffs obtained symbolical possession of the properties purchased by them. On the 2nd of December 1913 the defendant No. 2 was adjudged an insolvent. Subsequently when plaintiffs demanded rent from the tenants on the basis of their purchase, they were met with the objection that on the 6th September 1912 the defendant No. 2 had sold these properties to the defendant No. 1. The present suit was instituted for a declaration that the purchase by defendant No. 1 was collusive and that the plaintiffs by their purchase had acquired a good title to the properties in suit. The first Court decreed the suit but on appeal the decree was reversed and the plaintiffs' suit dismissed; the learned Judge found that the

defendant No. 1 had purchased the properties in suit for adequate consideration in good faith, and without any intent to defraud, defeat or delay the creditors of defendant No. 2.

2. Plaintiffs appeal and on their behalf two points have been urged before us:

(1) That the question whether the purchase was in good faith was a mixed question of law and fact, and upon the facts found by the lower Appellate Court as also upon the facts found by the first Court and not reversed by the Court of Appeal, it ought to have been held that the purchase was not in good faith and that its effect being to defeat or delay the creditors, the transfer was void u/s 53 of the Transfer of Property Act.

2. That the effect of the execution of the security-bond in favour of the Subordinate Judge of 24-Pargannas was to place the properties in custodia legis and that any private transfer of the properties was wholly void.

3. The learned Subordinate Judge in dealing with the first point has found that the sum of Rs. 2.400 was actually paid by the defendant No. 1 to defendant No. 2 as consideration for the conveyance and that the consideration was adequate. On the question whether the defendant No. 1 at the time of his purchase knew that the defendant No. 2 was indebted to the plaintiffs, the learned Subordinate Judge without coming to any definite finding proceeded to decide the case on the assumption that defendant No. 1 had such knowledge. He, however, was of opinion that the defendant No. 1 was not aware that the properties in suit had already been given as security. He also expressed the opinion that even if it were held that defendant No. 1 was aware of the existence of the security, that would only go to strengthen the finding as to his bona fides.

4. Taking the second point first, no authority has been shown to us in support of the proposition that the execution of a security-bond in favour of a Court has the effect of avoiding all subsequent alienations. In support of his contention the learned Counsel for the appellant has relied on Ghose on Mortgage, 4th Edition, page 138, and Fisher on Mortgage, 6th Edition, page 249. In our opinion the contention of the learned Counsel for the appellant finds no support in either of those authorities. The defendant No. 2, it seems to us, had a right to transfer the properties hypothecated in the security-bond subject to the lien created by him in favour of the Court. If the plaintiffs, instead of executing the decree as a simple money decree, had taken proper steps to enforce the security-bond in favour of the Court either by taking an assignment or in such other way as the law permits, the sale to defendant No. 1 would have been ineffectual as against the lien created by the bond.

5. It has been held in a series of cases that where property is given in security and the security is sought to be enforced, that should be done by bringing a suit u/s 67 of the Transfer of Property Act and it makes no difference whether the security bond is in favour of a Court or of a party to a suit. I need only refer to the cases of Aubhoyessury Dabee v. Gouri Sunkur Panday 22 C. 859 ; 11 Ind.

Dec. (N.S.) 568; Tokhan Singh v. Girwar Singh 32 C. 494 ; 1 C.L.J. 118 ; 9 C.W.N. 372; Musammat Chandrabati v. Babu Ram Prasad 27 Ind. Cas. 365 ; 19 C.W.N. 178 and Brojendra Lall Dass v. Lakshmi Narain 29 Ind. Cas. 149 ; 19 C.W.N. 961. A somewhat different view was no doubt taken in Shyam Sundar Lal v. Bajpai Jainarayan 30 C. 1060 ; 7 C.W.N. 914 but this case has not been followed in any of the later cases. The plaintiffs, therefore, having failed to enforce the security at most purchased the tight, title and interest of the judgment debtor. If it be held that on the date of sale the defendant No. 2 had no interest left in him, plaintiffs cannot claim any title by virtue of such purchase.

6. The question then arises, had the defendant No. 2 any saleable interest on the date of plaintiffs' purchase in the execution sale? The question turns on the effect of Section 53 of the Transfer of Property Act. I need not discuss all the cases to which we have been referred by either side. The principle seems to be well established since *Twyne's case* (1601) 3 Coke 80 6 ; 1 Sm. L.C. (12th Ed.) 1 ; 76 E.R. 809 and the words of the section are also clear that the mere fact that a purchase of this kind was for good consideration is not enough. It must also be shown that the purchaser acted in good faith. This was also laid down in *Hakim Lal v. Mooshahar Sahu* 34 C. 999 ; 11 C.W.N. 889 ; 6 C.L.J. 410 and *Chidambaram Chettiar v. Sami Aiyar* 30 M. 6 ; 16 M.L.J. 427 ; 1 M.L.T. 351. The decision in the last mentioned case was affirmed by their Lordships of the Judicial Committee in *Chidambaram Chettiar v. Srinivasa Sastrial* 23 Ind. Cas. 714 ; 18 C.W.N. 841 ; 36 M. 227 ; 26 M.L.J. 473 ; 16 M.L.T. 286 ; (1914) M.W.N. 754 ; 16 Bom. L.B. 783 ; 1 L.W. 963 ; 20 C.L.J. 571 (P.C.). The decision of Mookerjee and Holmwood, JJ., in *Hakim Lal v. Mooshahar Sahu* 34 C. 999 ; 11 C.W.N. 889 ; 6 C.L.J. 410 was also affirmed by their Lordships of the Judicial Committee on appeal in *Musahar Sahu v. Lala Hakim Lal* 32 Ind. Cas. 343 ; 43 C. 521 ; 30 M.L.J. 116 ; 3 L.W. 207 ; 20 C.W.N. 393 ; 14 A.L.J. 198 ; (1916) 1 M.W.N. 198 ; 19 M.L.T. 203 ; 23 C.L.J. 406 ; 18 Bom. L.R. 378 ; 43 I.A. 101 (P.C) and in doing so their Lordships laid down the law in the following terms:

When it was found that the transfer impeached was made for adequate consideration in satisfaction of genuine debts, and without reservation of any benefit to the debtor, it followed that no ground for impeaching it lay in the fact that the plaintiff (appellant) who, was a creditor, was a loser by payment being made to the preferred creditor--there being in the case no question of bankruptcy.

7. It has, however, been urged that as upon the finding of the Court below the purchase was made with the knowledge that the defendant was indebted to the plaintiffs, the transaction cannot be held to be bona fide. I can find no authority for the proposition that the mere fact of the indebtedness of a person or the knowledge on the part of a purchaser that a sale may defeat or delay the creditors is sufficient to negative the bona fides of a purchaser. As stated by Mookerjee and Holmwood, JJ., if there was good consideration and the intention to part with the whole interest is proved and it is not shown that the transfer was

a mere cloak for retaining a benefit to the vendor, it is valid against the creditors. But if the object of the transferor is to defeat or delay his creditors and that object is known to the transferee and he aids and assists in its execution, then the transfer is not in good faith. In this case there is no finding either that the intention of the transferor was to defeat his creditors or that the transferee aided the transferor in the execution of his object. Consequently upon the facts found by the Court below, the transfer cannot be impugned by the plaintiffs.

8. There is another circumstance which, in my opinion, establishes the bona fides of defendant No. 1. As pointed out in the judgments of the Courts below, if it be held that defendant No. 1 purchased with the knowledge that the property was given in security, he must have known that he could not by his purchase defeat those claiming under the security. If the plaintiff has been a loser, it is due to his own conduct in not enforcing the security-bond in the manner laid down by law.

9. The appeal fails and is dismissed with costs.

Richardson, J.

10. I agree.