
(1923) 12 AHC CK 0042
In the Allahabad High Court

Lala Meghraj and Others

APPELLANT

Vs

Mr. K.C. Bhattacharji and Others

RESPONDENT

Date of Decision : 18-12-1923

Acts Referred:

Succession Act, 1925 — Section 179
Transfer of Property Act, 1882 — Section 3

Citation : 78 Ind. Cas. 243

Hon'ble Judges : Sulaiman, J; Lindsay, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. These two cases are connected together. The earlier one, F.A. No. 433 of 1921, ought strictly speaking to be decided first, but in view of the facts we are about to set out we consider it expedient to dispose first of F.A. No. 86 of 1923. The record in that case has not been printed. We were of opinion that it was unnecessary to have this done in view of the decision at which we are about to arrive.

2. Before we proceed to deal with the questions which arise for determination before us, it is necessary to set out a number of facts which will have to be referred to hereafter.

3. We are concerned in these two cases with certain items of property which belonged to a Bengali gentleman named Kailash Ghandar Bhattacharji.

4. This gentleman, on the 16th August 1910, in order to raise a loan of Rs. 25,000 mortgaged three items of property to a mortgagee named Lala Earn Das.

5. Those items of property were as follows: --

6. 1. Mauza Sherpur.

7. 2. Mauza Lalpur.

8. 3. The Christy Cotton Bailing Press.

9. The Bank of Upper India, Limited, Meerut, which afterwards went into liquidation, had obtained in the year 1910 a simple money decree against Kailash Chandra Bhattaoharji and in execution of this decrees the Bank got Mauza Sherpur brought to sale and it was purchased on the 20th January 1913 by one Banarsi Das.

10. That sale was held subject to the mortgage which had been executed by Kailash Chandar in the month of August 1910.

11. In the month of June 1913 Banarsi Das, the auction-purchaser of Sherpur, redeemed the mortgage of the 16th August 1910 by paying a sum of Rs. 2,885 to the mortgagee L, Bam Das.

12. Kailash Chandar died on the 16th September 1912. He left a Will bearing date the 10th August 1911 and made bequests in favour of his widow and his four children.

13. One of these children was B. Krishna Chandar Bhattaoharji who was appointed executor under the Will.

14. Krishna Chandar Bhattaoharji took out probate of the Will on the 13th December 1913.

15. These are practically all the facts we have got to deal with in deciding the present cases.

16. To return to F.A. No. 86 of 1923. This appeal arose out of a suit brought by two sons and a daughter of the deceased Kailash Chandar in order to avoid the sale which took place in execution of the simple money decree obtained by the Bank of Upper India against their father Kailash Chandar.

17. The ground upon which these plaintiffs sought to avoid that sale was that the execution proceedings had been taken behind their backs and at the time the order for sale was made they had not been parties to the record.

18. The substantial defence which was set up by the defendants in that case, who included the Liquidators of the Bank of Upper India, was that the sale was perfectly valid and could not be set aside. It was pleaded that execution of the simple money decree against Kailash Chandar had begun in the latter's lifetime and it was pointed out that after his death his son Krishna Chandar was made a party to the execution proceedings in place of his deceased father.

19. It was claimed that Krishna Chandar, being the executor of his father's estate, completely represented that estate in the execution proceedings and that consequently there was no ground whatever upon which these plaintiffs were entitled to have the sale declared void.

20. The Subordinate Judge, who dealt with this suit, Mr. Abdul Halim, dismissed the plaintiffs' suit. He was of opinion that in no way could the execution sale at

which Banarsi Das purchased the property be deemed to be void. He was of opinion that in the execution proceedings leading up to the sale the estate of the deceased Kailash Chandar was fully represented by the executor.

21. The same question was in issue in the other suit out of which F.A. No. 334 of 1921 has arisen. That suit, with which we shall have to deal presently, was a suit brought to enforce certain rights under the mortgage executed in the month of August 1910.

22. The sons and daughter of Kailash Chandar, who were the plaintiffs in the suit which we have just been discussing, were impleaded as defendants in this mortgage-suit and they raised the plea that Banarsi Das, whose interest is now vested in all the plaintiffs in the mortgage-suit, could take no title under the purchase which he made in execution of the Bank's decree.

23. The Subordinate Judge, who decided this particular case, Mr. P.K. Eay, repelled the contention that Krishna Chandar fully represented the estate in the execution proceedings. Mr. Eay was of opinion that, although Krishna Chandar was without doubt the executor of his father's estate at the time these execution proceedings were going on, he had not taken out probate and for that reason Mr. Eay seems to have thought that he did not fully represent the estate.

22. On the other hand. Mr. Gay was of opinion that, notwithstanding this circumstance, it could not be declared that the sale in execution of the decree was void. It was pointed out that, at any rate, one of the legal representatives of the deceased judgment-debtor was a party to those proceedings, namely, Krishna Chandar, and that the failure to cite as parties to the proceedings, the other representatives of Kailash Chandar amounted at most only to, an irregularity whereby the sale in execution could not be treated as being void, but, at the best, voidable only.

25. In deciding this matter the learned Subordinate Judge relied upon the principles laid down in the Privy Council ruling in *Malkarjun v. Narhari* 25 B. 337 : 5 C.W.N. 10 : 2 Bom. L.B. 947 : 27 I.A. 216 : 10 M.L.J. 868 : 7 B.T.C.J. 739 (P.C.).

26. We are quite satisfied that both Courts were right in holding that this execution sale could not in any way be treated as a void sale. We prefer to follow the reasons given by Mr. Abdul Halim in his judgment and we have no hesitation in saying that in the execution proceedings anterior to the sale of the property the estate of the deceased judgment-debtor was fully represented. It seems to us nothing to the point to say that Krishna Chandar, who undoubtedly was his father's executor, could not fully represent the estate at the time these execution proceedings were going on because he had not at that time obtained probate of the Will. It is to be pointed out that every executor derives his title from the Will and not from the probate. The probate is indeed the only proper evidence of the executor's appointment, but notwithstanding this it is clear that the executor represents the estate of the testator from the time of his death.

There is dear provision to this effect in Section 179 of the Indian Succession Act which declares that the executor is the legal representative of the deceased for all purposes, and all the property of the deceased person vests in him as such.

27. It is an admitted fact that probate of the Will was subsequently taken I out and, that being so we, who are dealing with the case now, must take it that Krishna Chandar has conclusively been proved to be the executor of his father's estate, and that the estate of his father vested id him from the date of his father's death. The probate which was subsequently taken out established the Will from the date of the testator's death and is conclusive proof of the appointment of the executor; and further, it is provided by law, that once probate is taken out by the executor all intermediate acts which he has done in connection with the estate of the testator are validated.

28. It seems to us, therefore, to be impossible to say that the estate of the deceased judgment-debtor was not fully represented in these execution proceedings.

29. We may say here that we are not able to follow the view taken by a Bench of the Calcutta High Court in *Lakhya Dasy''a v. Umakanto Ckuckerbutiy* 2 Ind. Cas. 818 : 14 C.W.N. 256.

30. At the same time, we recognise that the judgment of the other Subordinate Judge, Mr. Eay, also proceeds upon a correot principle and that, even had our opinion regarding the nature of the executor's position been other than it is, we should have agreed with Mr. Eay's decision that the case ought to be dealt with upon the principles laid down in the Privy Council ruling to which we have referred. We take it, therefore, as being clear on all hands that the suit brought by the sons and daughter of Kailash Chandar for the purpose of having this sale set aside was bound to fail, and we hold definitely that the sale was not void but was a perfectly valid sale in favour of Banarsi Das.

31. As held by the learned Subordinate Judge Mr. Eay even if we were disposed to hold that the Will was voidable the suit brought by the sons and daughter was barred by limitation. The period of limitation to set aside a sale of this nature is one year and that period expired long ago.

32. This finding, therefore, disposes of F.A. 86 of 1923 which we must dismiss with costs to the respondent including in this Court fees on the higher scale, if any.

33. We have now to come to the other case, namely F.A. 334 of 1921.

34. We have already mentioned the fact that the plaintiffs in this case are said to represent the interest of Banarsi Das who purchased one of the items of the mortgaged property in the year 1913.

35. We have also mentioned the fact that on the 3rd June 1913 Banarsi Das redeemed the mortgage which had been executed by Kailash Chandar on the

16th August 1910.

36. The object of the present suit is to obtain the balance of this mortgage-money against the persons who have become subsequent transferees of the properties mortgaged other than the item of Sherpur which has come into the hands of the plaintiffs.

37. The village of Lalpur, which "was one of the items of property mortgaged, was sold to one Kishori Lal who is now represented by the defendants Nos. 6, 7, 8 and 9 in this suit.

38. The other item of the mortgaged property, namely, the Christy Cotton Baling Press, was sold to the defendant No. 5.

39. The plaintiffs are claiming as representatives of the original mortgagee to recover out of the items mortgaged the sums which they are liable to contribute under the mortgage.

40. One of the pleas which was raised on behalf of the 5th defendant, the present owner of that item of property known as the Christy Cotton Baling Press, was that the suit was time-barred. The validity of that plea depended upon the question whether this Baling Press was to be treated as moveable or Immovable property.

41. In the mortgage-deed which was executed by the deceased Kailash Chandar he described this particular item of property in the following words:

Ek manzil karkhana via imarat mausuma Christy Cotton Baling Press Meerut mai jami saman mutaliqa uske.

42. So far as we understand the case, the 5th defendant who has been impleaded, purchased the Baling Press, i.e., the machinery which goes to make up the Press, and has removed it to some place in the Punjab.

43. The learned Judge of the Court below was of opinion that the machinery of this Baling Press had undoubtedly been mortgaged under the document in suit. But he was of opinion that the machinery was moveable property and that, consequently, Article 120 of the second Schedule of the Limitation Act would apply.

44. It is now argued before us that the decision of the Court below on this point was wrong and that the item of property described in the mortgage-deed in the language to which we have just referred ought to be treated as Immovable property and not moveable property. After a full consideration of the arguments we are unable to entertain this contention.

45. We would say, in the first place, that there is practically no evidence on the record which gives us any accurate idea as to how this Baling Press was set up at Meerut.

46. There is no doubt a reference in the mortgage-deed to a building or " imarat,

" but if we look to the evidence in the case all we can find is this. One of the plaintiffs" witnesses, Wasayat Ali, says : " I saw the Christy Cotton Press for the first time at the end of 1913. The machinery was kept in the enclosure of Ganga General Mills."

47. The only other witness who speaks about this property is one Mr. Damodar Das, Vakil. This gentleman is the Director of the Ganga General Mills. He has deposed that the Mills held on lease the land on which their buildings were erected and it was stated by Mr. Damodar Das that his Company gave B. Kailash Chandar Bhattacharji a plot of land to keep his Cotton Baling Press on. Witness did not know the terms on which the ground had been given to Bhattacharji. He says he was treated as a sub-tenant. In cross-examination the witness said that K.C. Bhattacharji had erected some building but that this building had not been completed.

48. We are left, therefore, in doubt as to how this Press, which was set up in Meerut was located and, on such evidence as we have, do not see how we could possibly come to the conclusion that this Baling Press was Immovable property.

49. We have been referred to the definition of the expression "immovable property " contained in the General Clauses Act of 1897. This definition has to be read along with the interpretation section of the Transfer of Property Act (section 3) and in particular we have to pay attention to the words in this latter section " attached to earth."

50. We have mentioned already that there was no clear evidence before us that any building intended to shelter the machinery of this Baling Press was ever completed. But even if we assume that there was such a building it would be difficult for us, in view of this definition, to hold that the machinery which has now been removed to the Punjab and which has been sought to be sold in order to satisfy the claim of these plaintiffs was in any sense Immovable property.

51. We cannot decide this question on the English Law relating to Fixtures. We have to" pay attention to the definitions in the Indian Statutes.

52. If there was a building in existence inside which this machinery was sheltered it cannot be said that this machinery was attached to the building for the permanent beneficial enjoyment of the building itself as is contemplated in Clause (c) of the definition in Section 3 of the Transfer of Property Act.

53. It would be difficult in a case of this kind to speak of machinery being attached to a building embedded in the earth for the beneficial enjoyment of the building. On the other hand, it would seem more natural to suppose that the building is really put up for the purpose of sheltering the machinery and protecting it from the weather.

54. Nor, again, with reference to the definition of Immovable property contained in the General Clauses Act, is it possible to say that this machinery was permanently fastened to anything attached to the earth.

55. Having regard to this definition and to the state of the evidence in the case , we have no hesitation in saying that the learned Subordinate Judge was quite correct.

56. It follows, therefore, that we cannot interfere with that portion of the decree which declares that the claim, in so far as it related to this machinery, was beyond time being barred by the six years" tile of limitation.

57. We come then to the other part of the case. We have it that some of the defendants are the transferees of another item of the mortgaged property named Lalpur.

58. The Subordinate Judge was of opinion that these plaintiffs could only sell up Lalpur to the extent to which that item was liable under the terms of the mortgage. In other words, the Subordinate Judge, in accordance with the provisions of Section 82 of the Transfer of Property Act, distributed the liability of the three items of property as they stood at the time of the mortgage. Me was of opinion that the value of Sherpur which the plaintiffs purchased was represented by the figure Rs. 6,000. Lalpur he found was of the value of Rs. 5,000 while the Christy Cotton Baling Press was of the value of Rs. 25,000.

59. Acting on this principle he has given plaintiffs a decree for a certain sum as principal and a further amount as interest and directed that this amount be realised by the sale of the portion of the village of Lalpur sufficiently to satisfy the deoretal amount.

60. In appeal before us, however, the argument has been that the plaintiffs are entitled to throw the whole of the mortgage-debt upon Mauza Lalpur minus the share to which Sherpur is liable.

61. The suit in substance is a suit for contribution and the section which regulates the rights of the parties is Section 82 of the Transfer of Property Act which lays down that, where several properties, whether of one or several owners, are mortgaged to secure one debt such properties are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage after deducting from the value of each property the amount of any other encumbrance to which it is subject at the date of the mortgage.

62. There is in this case no question of a contract to the contrary and, consequently, applying the principle laid down in Section 82, it is evident that the three items of property which were mortgaged under the mortgage of 1910 were liable each to satisfy a ratable proportion of the mortgage-debt, the ratio being in proportion to their respective values. We have already indicated the values of these properties as they stood at the time of the mortgage. Sherpur was of the value of Rs. 6,000. Lalpur was of the value of Rs. 5,000 and the Christy Cotton Baling Press was of the value of Rs. 25,000.

63. It is, therefore, on the basis of the ratio so indicated that the claim of the plaintiffs must be decided. A case in which this principle was laid down is

reported in *Bhagwan Singh v. Mazhar Ali Khan* 23 Ind. Cas. 339 : 36 A. 272 : 12 A.L.J. 394.

64. The learned Subordinate Judge has held that the plaintiffs are entitled to recover from the present owners of Lalpur a share of the mortgage-debt calculated in accordance with the respective liabilities of the three items of property as defined in Section 82 of the Transfer of Property Act. In our opinion this decision of the learned Subordinate Judge is perfectly correct and ought not to be disturbed. The only other ground which is mentioned in the grounds of appeal is one with regard to future interest. We imagine this plea has been taken under some misapprehension. It seems to us that the decree of the Court below provides for subsequent interest and subsequent costs in the manner which is usual in the case of decrees for sale under Order XXXIV, Rule 4 of the Code of Civil Procedure. The cross-objection which has been filed in this case relates to the point which we have already decided in connection with F.A. No. 86 of 1923.

65. For the reasons already given, the cross-objection fails and is dismissed with costs.

66. This appeal fails too and is dismissed with costs including in this Court fees on the higher scale.