

(1970) 01 PAT CK 0011

In the Patna High Court

Case No : A.F.O.O. No"s. 19 and 74 of 1967

Mahabir Dass and Others

APPELLANT

Vs

Motibhai Narsibhai Patel

RESPONDENT

Date of Decision : 08-01-1970

Acts Referred:

Bihar Money Lenders (Regulation of Transactions) Act, 1939 — Section 13, 14, 2
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 66, Order 34 Rule 1
Transfer of Property Act, 1882 — Section 100, 58

Citation : AIR 1971 Patna 27

Hon'ble Judges : R.J. Bahadur, J;Kanhaiyaji, J

Bench : Division Bench

Advocate : Kailash Roy, D.P. Sharma and Maqbool Ahmad, for the Appellant; S. Sarwar Ali and Shashi Kumar Sinha, for the Respondent

Final Decision : Dismissed

Judgement

Kanhaiyaji, J.—Both the appeals arise out of Money Execution Case No. 2 of 1966 pending in the Court of the First Additional Subordinate Judge, Bhagalpur. They were heard together, and this judgment will govern both of them.

2. The decree-holder-respondent filed a money suit for the realisation of arrears of price of tobacco and bidi leaves sold to the judgment-debtor appellants. The said Money suit No. 156 of 1954/16 of 1958 was decreed in terms of the compromise on the 30th September 1958. The suit was decreed for a sum of Rs. 52,600/- with future interest at the rate of six per cent per annum till realisation. The decretal amount was to be paid by instalments, and in default of payment of any instalment the entire remaining decretal amount was made payable. The properties detailed in the compromise petition, which were attached before judgment, were made subject to first charge for the decretal amount, interest and cost of execution. The attachment, which had been effected under Order 21, Rule 54 of the Code of Civil Procedure, was made absolute, and the declaration of first charge was made by way of security for the realisation of the decree

money. The judgment-debtor-appellants executed a security bond creating first charge for the payment of the decretal amount as provided in the compromise decree. One Srimati Sona Bati, who had filed a miscellaneous case regarding a portion of the property, also joined the deed as a confirming party.

3. The judgment-debtors failed to pay the instalments, and, consequently, the decree-holder levied execution on the 17th January, 1966. The notices, which were issued, returned unserved twice. Then, the notices were sent through registered post, which also met the same fate. Thereupon, recourse to substituted service was taken. After the publication of the notice in the Bihar Gazette, the judgment-debtors appeared and filed an application under Sections 47 and 151 of the CPC on the 15th September, 1966, which was numbered as Miscellaneous Case No. 120 of 1966. The execution petition was challenged on the ground that the execution case was not maintainable, and a prayer for staying further proceedings of the execution case was made. The Court refused to stay the proceedings. Against this order, the judgment-debtors came in revision to this Court in Civil Revision No. 630 of 1966 which was summarily dismissed by Untwalia, J., with some observations. Thereafter, order for issue of sale proclamation was made by the executing court. The decree-holder filed a petition on the 6th September, 1966, praying that no notice of valuation was required to be served on the judgment-debtors. This petition was heard on the same day on which Miscellaneous Case No. 120 of 1966 was filed. The Court, after hearing the parties, order that no notice of valuation be issued in the execution case, and that the valuation given by the judgment-debtors be also noted in the sale proclamation. In the meantime, the judgment-debtors filed an application for fixing valuation u/s 13 of the Bihar Money Lenders Act on the 9th December, 1966. This was registered as Miscellaneous Case No. 148 of 1966. Later, on the 7th January, 1967, the petition was amended by inserting Section 47 of the Code of Civil Procedure. On the 10th January, 1967, the judgment-debtors filed a petition praying not to issue the sale proclamation until the disposal of Miscellaneous Case No. 148 of 1966. This application was rejected, and Miscellaneous Appeal No. 19 of 1967 is directed against the said order. The application u/s 47 of the CPC and Sections 13 and 14 of the Bihar Money-Lenders Act (Miscellaneous case No. 148 of 1966) was heard and dismissed by the learned Subordinate Judge on the 28th January, 1967. Miscellaneous Appeal No. 74 of 1967 is directed against the said order.

4. The learned Subordinate Judge held that there was no advance at all, rather it was purely supply of goods on credit which, according to the definition in the Bihar Money Lenders Act was not a "loan". The stipulation for interest in the compromise petition would also not render the amount of the decree a loan". He further held that the security deed executed as a guarantee for the payment of the decretal dues would not attract the provisions of Order 34 of the Code of Civil Procedure.

5. It has been argued in appeal on behalf of the respondent that when the order

passed on the 15th September, 1966, just referred to above, to the effect that no notice of valuation was required to be issued and that the valuation as given by the judgment-debtors was also to be noted in the sale proclamation stands, the application for fixing valuation was not maintainable. The general law is embodied in Order 21, Rule 66 of the Civil Procedure Code. Sub-rules (3) and (4) of Rule 66 provide for verification of the application for an order for sale and for the ascertainment by the Court of the matters to be specified in the Proclamation. That is still the general rule for the execution of decrees not of a kind referred to in the Money-Lenders Act and the Money-Lenders (Regulation of Transactions) Act.

In dealing with the execution of a decree passed in respect of a loan or interest on a loan by the sale of the judgment-debtor's property, Section 13 of the Money-Lenders Act requires that "the Court executing the decree, shall, notwithstanding anything to the contrary contained in any other law or in anything having the force of law, hear the parties to the decree and estimate the value of such property and of that portion of such property the proceeds of the sale of which it considers will be sufficient to satisfy the decree." Section 14 applies to the same class of cases as Section 13 and enacts that notwithstanding anything to the contrary contained in any other law or in any thing having the force of law the proclamation of the intended sale of the property in execution of a decree in respect of a loan or the interest on a loan shall include only so much of the property of the judgment-debtor, the proceeds of the sale of which the Court considers will be sufficient "to satisfy the decree and shall state the value of the property or portion of the property" as determined u/s 13. And other provisions follow to prevent the property being sold at a price lower than the price specified in the sale proclamation subject to certain exceptions.

6. Placing side by side the statutes, it is apparent that the statute book contains two very different methods of procedure in preparing and issuing sale proclamations, one procedure being applicable to a certain class of cases and the other procedure to all other cases. In my view, although a decree under execution may be a decree passed in respect of a loan, a Court does not act without jurisdiction in proceeding under Order 21, Rule 66 of the Code of Civil Procedure, if the judgment-debtor does not object to the procedure adopted by the Court. The question which of the two procedures was to be followed had been already concluded by estoppel or waiver by the act of the judgment-debtors. The judgment-debtors by accepting the position that no notice of valuation was required to be issued and that the valuation as given by them was also to be noted in the sale proclamation waived their right to raise this question and they cannot be allowed to reopen and reargue the same question.

7. It was, however, argued on behalf of the appellants that the amount of the decree was made a charge on the property and, as such, it would be in the nature of a mortgage bond and so the provisions of Sections 13 and 14 of the Money-Lenders Act would be attracted. The question, therefore, would be as to

whether the amount sought to be recovered from the appellants in the execution case is a loan. "Loan" has been defined in Section 2 (f) of the Bihar Money-Lenders (Regulation of Transactions) Act, 1939, hereinafter referred to as "the Act", and it means "an advance, whether of money or in kind, on interest made by a money-lender. and shall include a transaction on a bond bearing interest executed in respect of past liability and any transaction which, in substance, is a loan. . . .". Mr. Kailash Roy, who appears for the appellants, has contended that the transaction in suit is one which should be governed in all its different aspects by the provisions of the Act. A "money-lender" has been defined in Section 2 (g) of the Act, and it means "a person who advances a loan and shall include a Hindu undivided family and the legal representatives and successors-in-interest, whether by inheritance, assignment or otherwise, of a person who advances a loan." The question, therefore, arises whether the transaction between the parties is a "loan within the meaning of Section 2 (f) of the Act and whether the decree-holder, which is a firm dealing in tobacco and bidi leaves, is a money-lender. Sections 13 and 14 of the Act apply to the execution of a decree passed in respect of a "loan" or interest on a loan by the sale of the judgment-debtor's property. Mr. Roy has urged that the relevant words "loan" and "money-lender" must be understood in a wider sense. But, on a plain reading of Section 2, it is clear that any particular word defined in this section may have a meaning more limited than that given to it in this section, if it is so warranted by the nature of the subject which the section deals with, or by its very context. In the instant case, there should be no difficulty in holding that the transaction is not a "loan. Explanation (2) of Section 2 (f) is in the following words:

"A supply of goods on credit is not a loan".

The explanation makes it clear that supply of goods on credit is not a loan. True it is that loan is a wider word than the principal amount, actually lent, as it may be an advance in cash or kind or may be a transaction on a bond bearing interest executed in respect of past liability or may be any transaction which, in substance, is a loan. In the present case before us, the loan is not based on a document; but a consent decree has been passed in regard to the arrears of price of tobacco and bidi leaves sold by the decree-holder to the judgment-debtors and, for the payment of the decretal amount a guarantee deed has been executed by the judgment-debtors. It will thus be seen that the transaction is not a "loan" as defined by the Act, and the provisions of Sections 13 and 14 of the Act are not attracted.

8. In *Mt. Surajbansi Kuer and Others Vs. Mt. Larho Kuar*, , the facts were that the plaintiff filed a suit for recovery of Rupees 1132/- and odd under a handnote and the defendants raised a contention based upon Section 4 of the Act. The plaintiff in course of her business as a timber merchant supplied some timber to the defendants, and, for the purpose of ensuring payment of price of the timber she accepted a handnote in lieu thereof. The money due under the handnote was not paid, and, therefore, another hand-note was executed by way of renewal on a

date subsequent to the passing of the Act. In the suit to recover the amount due on the latter handnote, it was held that the transaction evidenced by either of the hand-notes was not a loan" within the meaning of Section 4 and the plaintiff was not a "money-lender" for the purpose of that section, because Section 4 intended to apply to those persons who were money-lenders by profession, This case does not help the contention that has been raised on behalf of the appellants. On a perusal of the other authorities cited on behalf of the appellants, it appears to me that the facts of each of those authorities are different and not applicable to the facts of the instant case. In *Attu Hussain v. Jai Narain Agarwalla*, AIR 1910 Pat 307, the suit was brought by the respondent on the basis of an instalment bond which had been executed by the defendant in favour of the plaintiff's brother, who was then joint with him. The bond was executed in respect of past liability upon two hand-notes. A plea of bar of Section 4 of the Act was taken on behalf of the defendant. It was held that the transaction did not amount to loan, as the original advance had been made before the Act. In *Nathimi Pandey v. Mahesh Rai* 1964 BLJR 777, this Court considered the application of Sections 2 (f) and 4 of the Act, and it was held that any sum advanced as principal without stipulation for payment of interest may not be "loan", but the moment there is any amount advanced with a condition for payment of interest it would come within the definition of "loan.". In *Mahasukh Ram Seth v. Sheo Prasad Seth* 1965 BLJR 247, it has been held that a suit based on the bond which was executed in respect of past liability subsequent to the date of his registration as a money-lender is not hit by Section 4 of the Act. Thus, it would appear that all the three cases relied upon on behalf of the appellants were in respect of advance of loan. The above authorities, therefore, are of no help to the appellants.

9. It was next argued that the amount of decree was made a charge on the property, and, as such, it would be in the nature of a mortgage bond and the provisions of the Act would be attracted. Mr. Roy submitted that the transaction may not be hit by the provisions of Section 4 of the Act, but still the provisions of Sections 13 and 14 of the Act would be attracted and it was mandatory on the Court to follow the procedure prescribed in these two sections. I have already held that the provisions of Sections 13 and 14 of the Act are applicable only for the execution of a decree passed in respect of a loan or interest of a loan by the sale of the judgment-debtor's property. The loan must fall within the definition of that word as given by the Act. The consent decree, which is being executed by the decree-holder respondent, is not a loan" as defined by Section 2 (f) of the Act. Therefore, this contention raised by Mr. Roy must be overruled.

10. It has been next argued that as the amount for which the compromise was arrived at between the parties was made first charge on the properties attached before judgment and a deed of security was executed in respect thereof, hence the provisions of Order 34 of the CPC should be applied in the execution proceeding. The provisions of Order 34 are applicable to suits relating to mortgages of immovable property. A mortgage is the transfer of an interest in

specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, etc. The words "transfer of an interest distinguish a mortgage from charge. In a charge no right in rem is created but the right is something more than a personal obligation for it is a jus ad rem. that is, a right to payment out of property specified, while a simple mortgage is a right in rem. There is thus very little difference between a charge and a simple mortgage except that a charge is only frond as against a subsequent transferee with notice. In this case, there is no difficulty in holding that by execution of the guarantee deed only a charge was created and there was no mortgage of the properties attached before judgment. In my view, the he that the security bond was executed as a guarantee for the payment of the decretal dues will not attract the provisions of Order 34 of the Civil Procedure Code. Secondly, what is sought to be executed in the execution case is a decree and not the security bond independently of the decree. Further, I find that the decree, which is being executed, was passed in a money suit. For the reasons given above, it must be held that the provisions of Order 34, Code of Civil Procedure, have no application to the facts and circumstances of this case.

11. Mr. Roy relied on two decisions, one of the Allahabad High Court in Narain Sarup and Others Vs. Nanda, and the other of the Lahore High Court in Benares Bank Ltd., Saharanpur v. Har Prasad, AIR 1936 Lah 482. The former case was in respect of a simple mortgage hypothecating the interest the mortgagor had in the immovable property. It was held that the deed of transfer in which the executant hypothecates his interest in the property and covenants to pay the interest constitutes a simple mortgage and not a charge. Similarly, in the latter case, a distinction has been pointed out between a mortgage and a charge. Both the authorities cited on behalf of the appellants have thus no application to the facts of the instant case.

12. I have already indicated that Miscellaneous Appeal No. 19 of 1967 is only directed against the order dated the 10th January, 1967, refusing to stay the proceeding pending the disposal of Miscellaneous Case No. 148 of 1966, out of which Miscellaneous Appeal No. 74 of 1967 has arisen.

13. For the reasons given above, Miscellaneous Appeal No. 74 of 1967 fails and consequently Miscellaneous Appeal No. 19 of 1967 also fails.

14. As a result, both the appeals are dismissed with costs.

Bahadur, J.

15. I agree.