

(1914) 07 CAL CK 0045
In the Calcutta High Court

Maharaj Bahadur Singh and Others

APPELLANT

Vs

Surendra Narain Singh and Others, Chatrapat Singh and
Others and Mr. A.H. Forbes and Others

RESPONDENT

Date of Decision : 08-07-1914

Acts Referred:

Citation : AIR 1915 Cal 586 : 28 Ind. Cas. 898

Hon'ble Judges : Walmsely, J;D. Chatterjee, J

Bench : Division Bench

Judgement

1. These four appeals arise out of four applications to set aside a sale in execution of a decree, three u/s 311 and one u/s 313 of the Civil Procedure Code.

2. A short narrative of the facts, which are a little complicated, may help a clear conception of the question raised in these appeals.

3. Roy Dhanpat Singh Bahadur was the zemindar of pergunah Hawali in the District of Purneah and his nephew, Babu Chhatrapat Singh, held a patni of a property named Saifgunj in this pergunah. Dhanpat sold his zemindar I interest in this pergunah to one Bhagwanbati Chowdhrani in June 1893, and then brought a suit against Chhatrapat for the arrears of the patni rent that had accrued due prior to the said sale and ultimately obtained a decree on the 10th of July 1896. On the 12th of July 1896 Dhanpat assigned all his properties including this decree to certain trustees for the payment of his debts and died in September following. The trustees applied for the execution of the decree and on the objection of Chhatrapat, Maharaj Bahadur, the heir-at-law of Dhanpat, was added as a party to the execution.

4. In the mean time Chhatrapat did not pay the patni rent and Bhagwanbati put up the patni to sale under Regulation VIII of 1819. Mr. A.H. Forbes, who was the executor to the estate of his deceased father, A.J. Forbes, who was a durpatnidar under Chhatrapat, deposited the arrears u/s 13(4) of the Regulation for saving the durpatni interest from the effect of the sale and obtained possession

as mortgagee under the provisions of that Section.

5. Chhatrapat's interest in the patni was then sold in execution of a money decree and purchased by Surendra Narain Singh on the 1st of September 1902.

6. The trustees took out a second execution in 1904 and Surendra Narain objected on the ground that the patni could not be sold as the decree was a money decree. This objection was rejected and the patni was fixed for sale on the 10th of November 1904.

7. Mr. A.H. Forbes tried to avert the sale but was unsuccessful, and Surendra's suit for the same purpose was dismissed up to the High Court. On the 9th of July 1906, A. H. Forbes instituted a regular suit for a declaration that the decree under execution was not a rent decree and for a perpetual injunction upon the decree-holders not to execute the same against the patni mehal. This suit was decreed by the first Court, but dismissed by the High Court which held that the decree was a rent, decree and could be executed as such. This was on the 8th of April 1908. Forbes applied for leave to appeal to the Privy Council and the trustees applied for the sale of the patni mehal on the 9th May 1908, and they impleaded Chhatrapat alone as judgment-debtor. The leave to appeal to the Privy Council was granted on the 30th June 1908. The property was sold on the 6th July 1908 and was purchased by Mr. A.H. Forbes in his personal capacity for Rs. 61,200.

8. For setting aside this sale one application u/s 311 was made by Surendra Narain and his case was numbered as 665 of 1908 and has given rise to Appeal No. 138 of 1911 in this Court, and another application u/s 311 was made by Chhatrapat; his case was numbered as No. 16 of 1909 and has given rise to Appeal No. 158. A third application u/s 311 was made by Mr. A.H. Forbes as executor to the estate of his deceased father. This was case No. 17 of 1909, in the Court below and has given rise to Appeal No. 160.

9. Mr. A.H. Forbes in his personal capacity as the auction-purchaser of the mehal made an application u/s 313 of the CPC on the ground that the judgment-debtor had no saleable interest at the time of his purchase. His case was numbered as 18 of 1909 and has given rise to Appeal No. 159 of 1911 in this Court. These four cases were tried together by the District Judge of Purnea who has allowed all of them.

10. These appeals are by the decree-holders.

11. It has been contended on their behalf that the Court below has erred in setting aside the sale on the ground of non-service of notice on Chhatrapat because

(a) the application for execution was a continuation of the previous application and therefore, no fresh, notice was necessary;

(b) Chhatrapat had no subsisting interest in the property and no notice was

necessary;

(c) Chhatrapat actually appeared in the case and, therefore, no notice was necessary;

(d) notice was practically served on his am-mukhtar Sokilal and he must have known of it:

(e) Surendra was not entitled to notice as he purchased pendente lite.

11. Secondly, it was argued that notice or no notice the sale could not be set aside unless the applicant could make out substantial injury.

12. Thirdly, that at the time of the sale there was a, subsisting decree of the High Court declaring that the decree was a decree for rent for which the tenure was liable; the subsequent reversal of the decree by the Privy Council cannot invalidate the sale.

13. Fourthly, that Forbes could not be allowed to take two inconsistent positions; when he applied u/s 311 he did so on the basis of the judgment-debtor having some interest, he could not at the same time say u/s 313 that the judgment-debtor had no interest.

14. The learned Vakil for the respondents contends that it is not necessary to go into the question of notice and other questions raised by the appellants, as the doctrine of *lis pendens* furnishes a complete defence of the order made by the lower Court. This argument is based on the judgment passed by the Privy Council in the appeal of Mr. Forbes on the 4th of March 1914 more than three years after the judgment under appeal in this case. The sale took place on the 6th July 1908 pending the appeal to the Privy Council. The doctrine of *lis pendens* rests on the principle that the law does not allow litigant parties to give to others pending the litigation rights over the property in dispute so as to prejudice the opposite party: *Bellamy v. Sabine* (1857) 1 De G. & J. 566 : 26 L.J. Ch. 797 : 3 Jur. (N.S.) 943 : 6 W.R. 1 : 44 E.R. 842 : 118 R.R. 228; *Wigram v. Buckley* (1894) 3 Ch. 483 : 63 L.J. Ch. 689 7 R. 469 : 71 L.T. 287 : 43 W.R. 147 and it is now settled that this doctrine applies to sales *in invitum*. See *Radhamadhub Holdar v. Manohar Mukerji* 15 C. 756 : 15 I.A. 97 : 12 Ind. Jur. 297 : 5 Sar. P.C.J. 211 *Moti Lal v. Karrabuldin* 25 C. 179 : 24 I.A. 170 : 1 C.W.N. 639; *Dinonath Ghose v. Shama Bibi* 28 C. 23 : 4 C.W.N. 740. The property in dispute was the *patni* in which the plaintiff had substantial rights; the object of the suit was to restrain the appellants from selling this property in execution of their decree of July 1896 and the appellants brought about the sale pending the appeal to the Privy Council, which ultimately held that the plaintiff's suit ought to have been decreed. We think that the facts are sufficient to attract the application of the doctrine of *lis pendens* and the act of the appellants in bringing about the sale cannot prejudice the plaintiff and make the judgment of the Privy Council nugatory.

15. The learned Vakil for the appellants contends that the principle of *lis pendens*

does not apply, as the *Us pendens* is the very suit in which the decree in pursuance of which the sale took place was passed; and he relies on the case of *Shiv Lal Bhagwan v. Shambhu Prasad Parvati Shankar* 29 B. 435 : 7 Bom. L.R. 585. The decree, however, in execution of which the sale took place was not the decree under appeal to the Privy Council. The sale took place, under the decree of July 1896, and the *lis pendens* was the suit of July 1906. The decree of the High Court, which was under appeal to the Privy Council, only held that the decree of July 1896 was a rent decree and was not the decree under which the sale took place. The Bombay case, therefore, does not help the appellants and no other case is relied on in their favour.

16. In this view of the case it is not necessary to decide the grounds urged by the learned Vakil for the appellants. As the case, however, may not terminate in this Court, we may shortly express our views on the said grounds. Supposing that the application for execution made on the 9th May 1908 was one for the continuation or restoration of the previous application, it is not shown that it was within one year of the last order passed on that application; the issue of a notice was, therefore, necessary.

17. It is true that Babu Chhatrapat Singh had no subsisting interest but, the appellants chose to treat him alone as the Judgment-debtor and wore, therefore, bound to serve him with notice. It has not been shown that he appeared in this case and there is nothing to show that Soki Lal was authorised to receive any notice for him. As regards Surendra his title suit had been dismissed by the High Court and the appellants were not willing to treat him as the legal representative of Chhatrapat and did not want to execute the decree against him; they were not, therefore, bound to issue notice upon him. It has been contended, however, that the non-service of notice u/s 248 was a mere irregularity and as no substantial injury is found to have occurred there was no reason for setting aside the sale. Some recent cases based on the case of *Malkarjun v. Narhari* 25 B. 337 : 27 I.A. 216 : 5 C.W.N. 10 : 10 M.L.J. 368 : 2 Bom. L.R. 927 seem to support that contention. See *Levenia Ashton v. Madhabmoni Dasi* 5 Ind. Cas. 390 : 14 C.W.N. 560 : 11 C.L.J. 489 *Rasaraj Kunai v. Prosonna Kumar Roy* 15 Ind. Cas. 506 : 40 C. 45. The matter, however, was before the Privy Council in the case of *Raghunath Das v. Sundar Das* 24 Ind. Cas. 304 : 18 C.W.N. 1058 : 1 L.W. 567 : 27 M.L.J. 150 : 16 M.L.T. 353 : (1914) M.W.N. 147 : 16 Bom. L.R. 814 : 20 C.L.J. 555 : 13 A.L.J. 154 : 42 C. 72 (Privy Council Appeal No. 20 of 1912 decided on the 18th of May 1914) and their Lordships approved of the decision of this Court in *Gopal Chunder Chatterjee v. Gunamoni Dasi* 20 C. 370 and distinguished the case of *Malkarjun v. Narhari* 25 B. 337 : 27 I.A. 216 : 5 C.W.N. 10 : 10 M.L.J. 368 : 2 Bom. L.R. 927 as one in which notice had been actually served on a person whom the Court then held to be the legal representative. The learned District Judge was, therefore, right in holding that the non service of the notice u/s 248 vitiated the sale.

18. The previous consideration disposes of the second and the third grounds.

19. As regards the fourth ground the auction-purchase was made by Mr. Forbes in his personal capacity and we do not think that he should be debarred from applying u/s 313 of the CPC in this capacity, He had tried his best to prevent the sale in order to protect the interests that he had as the executor of his father and when all his efforts failed he made the purchase in reliance on the decree of the High Court. That decree has now been set aside and he should not be a loser because the appellants insisted upon a sale which has been interdicted by the decree of the Privy Council

20. In this view of the case the appeals are all dismissed with costs five gold mohurs in each case.