
(1945) 12 CAL CK 0020

In the Calcutta High Court

Case No : Appeal from Original Order No. 185 of 1943

Manindra Chandra Roy Chaudhury and Others

APPELLANT

Vs

Jagadish Chandra Majumder and Others

RESPONDENT

Date of Decision : 07-12-1945

Acts Referred:

Citation : (1945) 12 CAL CK 0020

Final Decision : Dismissed

Judgement

Akram, J.—This appeal by the Defend judgment-debtors arises out of a proceeding under sec. 47 and Or. 21, r. 90, C. P. C. The Respondents Nos. 1 and 2 on obtaining a mortgage decree in Suit No. 29 of 1936 on a compromise for Rs. 12,000 payable by instalments received-certain payments, and thereafter for Unbalance outstanding about Rs. 6,500 started mortgage execution Case No. 20 of 1941 and caused some property, Lot No. 1, of the judgment-debtors to be sold, which was purchased on the 26th January, 1943, by Respondent No. 3. Sarojini Debi. The judgment-debtors there upon made an application under sec. 47 and Or 21, r. 90 for setting aside the sale (Misc. Case No. 17 of 1943) but their application was rejected by the Court on the 27th April, 1943. Being aggrieved thereby the judgment-debtors have preferred the present appeal. The only point that has been pressed before us by the learned Advocate for the Appellant is that the Court below was in error in refusing to set aside the sale although the sale had taken place in violation of the provisions of sec. 35 of the Bengal Money-Lenders Act.

2. It is urged by the learned Advocate that although the decretal dues amounted to only about Rs. 6,500 and the valuation of the properties given in the sale proclamation was Rs. 14,000 the Court below failed to specify in the proclamation how much of Lot No. 1 it considered to be necessary to sell and the price thereof in order to satisfy the decree; that in any event even if the direction to the Nazir to sell half of Lot No. 1 at the first instance were to be considered as a modification of the sale proclamation issued, as soon as the highest bid of Rs.

2,000 for the half portion of Lot No. 1 was found to be insufficient to satisfy the decree, the Court should have stayed its hands and dropped the execution proceedings unless the decree-holders consented to forego the balance due under the proviso to sec. 35 of the Bengal Money-Lenders Act or unless some other proper order came to be passed by the Court for the sale of the property the sale of the entire Lot No. 1 forthwith was bad.

3. Regarding the above objections it is to be observed that the sale proclamation was settled after notice to the Appellants and after hearing the parties vide Order No. 28, dated 7th August, 1942 and Order No. 61, dated 23rd November, 1942; no objection was raised by the Appellants at the time of settling the sale proclamations on the ground of non-compliance with the procedure laid down in sec. 35 of the Bengal Money-Lenders Act. It is not unlikely that the prayer to sell half the portion of Lot No. 1 first may have been acceded to, having regard to the final decree for sale under Or. 34, r. 5 (3), C. P. C. However, in view of Or. 21, r. 90, proviso (2) I am of opinion that the Appellants are now precluded from questioning the validity of the sale on such grounds of irregularity as are mentioned above. Furthermore, it appears that the Appellants themselves suggested the course to which they are now taking exception. See Order No. 69, dated 23rd January, 1943, which runs as follows:

Judgement-debtors Nos. 1 and 2's petition filed on 20th January, 1943, with C. S. map, praying for selling the half of the properties as that half may fetch the entire decretal dues is put up-to-day. Heard learned pleaders of both sides. The learned pleader for the judgment/debtors suggests that an undivided half of lot No. 1 he put up to sale first and that if the bid does not reach up to the decretal amount the whole plot may be put up to sale. The decree-holder's pleader does not object to this. Ordered: that an undivided half share of lot No. 1 belonging to the judgment-debtors shall be put up to sale in the first instance and that if the bid does not reach up to the decretal amount as advertised it will not be accepted and in that case the Nazir is directed to put up to sale the entire lot No. 1 forthwith. Let the order be announced by the Nazir before the sale is held.

4. I do not think therefore that the Appellants can now make a grievance of what they themselves suggested for their own benefit, being-followed by the Court. In any case they stood by and acquiesced in what was being done. It should also be noticed that the Respondent No. 3, auction-purchaser is a stranger to the suit and has obtained delivery of possession of the property in question in February, 1944. For the above reasons I am of opinion that there is no substance in this appeal and it is accordingly dismissed with costs--the hearing-fee is assessed at three gold mohurs to be divided equally between the two sets of Respondents who have appeared before us.

Chakravartti, J.

5. I agree, but would desire to add a few observations. Of the two objections to the sale taken in the Court below under Or. 21, r. 90, C. P. C. Mr. Hiralal

Chakravarti, in this Court, urged only one. That objection was that the sale was bad by reason of the fact that the provisions of sec. 35 of the Bengal Money-Lenders Act had been contravened.

6. The facts relevant to that contention are as follows: On the 10th June, 1941, the decree-holders commenced execution proceedings for recovery of a sum of roughly Rs. 6,500 that being the balance of the decretal amount--by sale of the mortgaged properties which consisted of two items, namely, a piece of vacant land and a dwelling house. The Court, after the issue of notices under Or. 21, r. 66. C. P. C., directed the sale proclamation to issue on the 11th July, 1942. To that order the judgment-debtors objected by a petition and their complaint was that no date had been fixed for the settlement of the sale proclamation and consequently they had had no opportunity to state their objections. The objections which they set out in their petition related solely to the valuation of the two properties. On receipt of this petition the Court directed notices to be issued on the decree-holders and after considering the objections, settled the proclamation by an order dated the 23rd November, 1942, The proclamation as settled, comprised both the properties but showed for each of them the valuation given by the judgment-debtors which the decree-holders accepted, namely, Rs. 14,000 for the first property and Rs. 10,000 for the second. After the sale proclamation had been issued, the judgment-debtors returned to the attack and filed successively three applications by which they put forward a single objection. The objection taken was that the decree-holders were entitled to advertise for sale only so much of the property as would be sufficient to satisfy the decretal debt and since the balance of the debt was only Rs. 6,500 and since the value of the first property had been admitted to be Rs. 14,000 the decree-holder could advertise for sale only a half-share of the first property. The Court took up these petitions or rather the last one of them dated the 20th January, 1943, on the 23rd January, 1943. But at the hearing the judgment-debtors themselves suggested that an undivided half-share of the first property might be put up to sale first and if the highest bid offered for it proved to be lower than the balance of the decretal debt, then the whole of the first property might be put up to sale. This suggestion was accepted by the decree-holders and the Court made an order in accordance therewith, adding a direction that the Nazir should announce this order to the bidders.

7. The sale took place on the 26th July. The highest bid for the half-share of the first item of the property proved only to be Rs. 2,000 and thereupon the entirety of the first property was put up to sale and sold for Rs. 12,000.

8. The judgment-debtors objected to the sale by an application under Or. 21, r. 90, C. P. C. The objection under sec. 35 of the Bengal Money-Lenders Act, as placed before the trial Court, was that the sale was bad in that the Court had failed to specify in the sale proclamation, as required by the section, so much of the property as it considered saleable at a price sufficient to satisfy the decree; and, further, that the immediate sale of the whole of the first property upon the

bid for the half-share being found insufficient was bad in law. The Court repelled these objections by holding that since the sale proclamation had been settled after considering the objections raised by the judgment-debtors, the Court must be deemed to have had sec. 35 in mind and to have specified the entirety of the mortgaged property as saleable in execution; and, secondly, that in any event the procedure followed at the sale had been suggested by the judgment-debtors themselves and they having caused the sale to be held in that manner, could not now turn round and question it as illegal. The Court further held that no injury, substantial or otherwise, had been established.

9. In this Court Mr. Chakravarti began by stating his objection in the same terms, but ultimately he modified it to a form which involved an assumption that the Court had in fact complied with the main provision of sec. 35 and had in effect specified a half share of the first property as saleable in execution. On that assumption he contended that when the highest bid for the half-share specified in the sale proclamation proved to be less than the specified price, the Court had open before it only two courses; it could either sell the property at the price offered if the decree-holder consented in writing to forego the deficiency or sell nothing at all. The decree-holder had not, in fact, consented and therefore no sale of anything could possibly be held. The immediate sale of the entirety of the first property was in clear contravention of sec. 35 and utterly bad in law.

10. If the sale proclamation could be held to have specified a half-share of the first property in accordance with sec. 35 of the Bengal Money-Lenders Act, the argument of Mr. Chakravarti would be unanswerable. The section provides that notwithstanding anything contained in any other law for the time being in force, the Court shall specify in sale proclamation only so much of the property of the judgment-debtor as in the opinion of the Court would be sufficient to satisfy the decretal amount; secondly, that the property so specified shall not be sold at a price lower than the price specified; and, thirdly, that the property may be sold at the amount of the lower bid if the decree-holder consents in writing to forego the difference between such amount and the price specified. It is quite clear that if the highest bid for the specified property falls short of the specified price and the decree-holder does not forego the deficiency, no sale can be held at all and a sale of any further or larger property, inclusive or exclusive of the property specified, would be entirely out of the question. What the decree-holder can do in such circumstances to recover his money is an entirely different matter. Perhaps he may move the Court for a re-sale after the issue of fresh sale proclamation, or perhaps he may apply to have a larger quantity of the property specified, if any be available.

11. I may observe in passing that it is by no means clear to me whether the price specified in the sale proclamation should be exactly the decretal amount. That it cannot be smaller sum is certain, for it must be sufficient to satisfy the decree; but on the language of the statute I am not sure that it cannot be a larger sum. It is significant that when the section speaks of the decree-holder

foregoing the difference, it speaks of his foregoing not the difference between the amount of the bid and the price specified but foregoing so much of the amount decreed as is equal to that difference, a form of expression which rather suggests that the decretal amount may be a different sum. That question, however, need not detain us further.

12. Before taking up the objection under sec. 35 of the Bengal Money-Lenders Act, I may refer to one matter which arises out of proviso (2) of Or. 21, r. 90, C. P. C., added by the Calcutta High Court. It is provided there that no sale shall be set aside on the ground of any defect in the proclamation of sale at the instance of any person who after notice did not attend at the drawing up of the proclamation or of any person in whose presence the proclamation was drawn up, unless objection was made by him at that time in respect of the defect relied upon.

13. Now, sec. 35 of the Bengal Money-Lenders Act provides that the Court shall specify in the proclamation so much of the property as it considers saleable at a price sufficient to satisfy the decree. It is a provision relating to the contents of the sale proclamation and its effect, to my mind, is to amend or supplement Or. 21, r. 66 (2) (a) which directs the Court to specify in the sale proclamation "the property to be sold." Any objection regarding non-compliance with sec. 35 in specifying the property to be sold is, in my view, a defect in the sale proclamation within the meaning of the second proviso to Or. 21, r. 90, C. P. C. It follows that an objection that the sale proclamation did not conform to sec. 35 of the Bengal Money-Lenders Act cannot avail a judgment-debtor in an application under Or. 21, r. 90, if he was present at the drawing up of the sale proclamation and did not raise any such objection at the time, nor can it avail a judgment-debtor who, after receiving notice did not attend at the drawing up of the sale proclamation at all. In the present case the judgment-debtors were present at the drawing up of the sale proclamation and while taking several other objections, they took none under sec. 35 of the Bengal Money-Lenders Act. It is true that in three subsequent petitions they spoke of the decree-holder being entitled to sell only so much of the property as would be sufficient to satisfy the decretal debt. But even if those petitions might be construed to contain an objection under sec. 35 of the Money-Lenders Act, they were filed not at the time of the drawing up of the sale proclamation but after the sale proclamation had been settled and issued. It is, therefore, clear that the judgment-debtors in the present case could not take any objection to the sale proclamation as such on the ground that there was any defect therein arising out of non-compliance with sec. 35 of the Bengal Money-Lenders Act.

14. It was when this difficulty was pointed out to Mr. Chakravarti that he modified his original contention and submitted that the Court had in fact complied with the main provision of sec. 35 and had in fact specified a half-share of the first property. Since, so the argument ran, a half share of the first property had been specified, the proviso to sec. 35 came into play and in selling the entire

property immediately on the bid for the property proving insufficient, the Court had acted with illegality. The basis of this contention has now to be examined.

15. Mr. Chakravarti contended that by the application dated the 20th January, 1943, where the judgment-debtors pleaded that the decree-holder was entitled to sell only a half share of the first property, they did indeed raise an objection under sec. 35. He contended next that when the Court considered that objection on the 23rd January, it really re-opened the sale proclamation ; when the Court accepted the suggestion of the judgment-debtors, it really amended the proclamation of sale; and when it directed the Nazir to announce this order to the bidders, it really directed the amended sale proclamation to be issued and published. On these facts, Mr. Chakravarti contended that there had been in fact an objection by the judgment-debtors to the drawing up of the sale proclamation and an objection which had succeeded. A provision for sale of the half-share had been secured and that Being so, the proviso to the section was attracted and the bar contained in the second proviso to Or. 21. r. 90, was not in his way.

16. I am unable to accept this contention. It is quite clear that till after the sale had been held, the judgment-debtors never thought of sec. 35 at all. There was certainly in some of their petitions an objection to the effect that the decree-holder could only advertise for sale so much of the property as would be sufficient to satisfy the decree, but apart from the fact that these petitions were filed after the sale proclamation had been issued, it seems to me that the objection had reference not to sec. 35 of the Bengal Money-Lenders Act but to rr. 4 and 5 of Or. 34, C. P. C., which speaks of the mortgaged property or a sufficient part thereof being sold, I may point out further that if the Court had specified a half-share of the first property as contended by Mr. Chakravarti, it would have to specify a price for that half-share. The Court did not specify any such price. I am also unable to hold that when the Court directed the Nazir to announce the order to the bidders, it was in effect directing the publication of an amended proclamation of sale. What the Court did was really to give certain administrative directions as regards the method of the sale as is done when a property advertised for sale and consisting of several items is directed to be sold in lots,

17. I am, therefore, of opinion, that the assumption upon which Mr. Chakravarti's contention is based is not justified by the facts. Then having been no specification of the half-share of the first property or any property in the sale-proclamation in accordance with sec. 35 of the Bengal Money Lenders Act, the proviso did not come into play at all. The proviso speaks of "property as specified." If on the other hand the contention was that the sale proclamation itself was defective, then that contention, as I have already explained, is not open to the judgment-debtors.

18. Mr. Das contended that in any event the judgment-debtors had established no prejudice, substantial or otherwise, which might be traced to the illegality complained of. I cannot accept that contention as sound. If the proviso applied to the

case, then clearly the immediate sale of the entire property was illegal and the position would be that disregard of the proviso had caused the sale of a property not liable to be sold, while its observance would have saved the property, at least so far as this sale was concerned. The prejudice in that case would be, patent.

19. But I have held already that the proviso does not apply. It was further contended by Mr. Chakravarti, though somewhat faintly, that sec. 35 is an independent provision and since it contains a mandate to the Court to specify a sufficient quantity of the property in the sale proclamation, disregard of the section would make a sale per se illegal. I am unable to accept that view of the section. The section, as I read it, is only supplementary to Or. 21, r. 66, C. P. C., and in effect amends one of the provisions of that rule. It follows that any illegality in regard to an entry directed by sec. 35 of the Bengal Money-Lenders Act can have no graver consequence than a similar illegality in regard to any entry directed by r. 66 of Or. 21, C. P. C.

20. In the result, I agree with my learned brother that this appeal should be dismissed with costs. Costs to be divided equally between the two groups of appearing Respondents.