

(1934) 03 CAL CK 0014
In the Calcutta High Court

Protiva Sundari Debi

APPELLANT

Vs

Sarada Charan Goho and Others

RESPONDENT

Date of Decision : 20-03-1934

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 78, 47

Citation : AIR 1935 Cal 15 : 155 Ind. Cas. 848

Hon'ble Judges : Buckland, Acting C.J.

Bench : Division Bench

Judgement

Buckland, AG.C.J.

1. The plaintiff in this case asks for a declaration that the sale held by the Registrar of this Court on 25th September 1931 in Suit No. 1120 of 1927 is not binding. The facts are not in dispute. The plaintiff's husband and one Himangshu Sekhar Gupta were the joint owners of a moiety of a printing press known as the "Gupta Press" situate at No. 221, Cornwallis Street, and the copyright in a publication known as the "Gupta Press Panjika" as well as other publications.

2. The owner of the other moiety was the defendant Sushila Bala Debi. In the year 1918 Sushila Bala Debi brought a suit against the plaintiff's husband for partition and accounts, and on 28th June 1918 Mr. Nripendra Nath Bose was appointed receiver. The terms on which he was appointed are set out in para. 3 of the plaint, and he was appointed to take possession of the "Gupta Press" with its goodwill, lease hold rights, machinery, stock-in-trade, printing machineries copyright and materials of and in the Gupta Press Panjika or Year Book, corrugated iron roof room on the first floor of premises No. 221, Cornwallis Street, to be sold as a going concern by the receiver, and the copy right in other publications, with liberty to the parties to bid and set off half the amount of the bid less Rs. 4,000.

3. On 20th December 1923 the receiver was directed to print the publication known as the "Gupta Press Panjika" for the year 1924-25 and to raise Rs. 5,000

at 12 per cent on the security of the Gupta Press concern for, I presume, the purposes of financing the publication, which he did by a mortgage dated 8th August 1924, whereby he borrowed Rs. 5,000 from the defendant Sarada Charan Goho on the security of what I may very shortly state was the press and its goodwill. The defendant Goho brought a suit in this Court on his mortgage and obtained a final decree which directed the mortgaged properties to be sold, and it is alleged that at the sale in execution of the decree not only was the mortgaged property sold but other property not included in the mortgage was also sold. So far as the plaintiff charges that was done fraudulently, such charge has now been withdrawn and the case has been limited to the claim to have the sale set aside so far as it affects property which was sold and which was not the subject of the mortgage and therefore should not have been sold. What was mortgaged was

all beneficial interest and goodwill in the said business carried on under the name and style of Gupta Press at 221 Cornwallis Street, Calcutta, and secondly, all and singular the several chattels and things belonging to the said Gupta Press concern and specifically described in the schedule hereto.

4. Turning to the schedule, one finds there five items which are sufficiently specific not to admit of much error. There is no mention of any publication or of the Gupta Press Panjika to which I understand a certain value is attached. To the plaint is attached a schedule in two parts, the first part of which admittedly includes the property covered by the mortgage, and the second part of which includes items admittedly not within the schedule to the mortgage but which, it is argued on behalf of the defendant are within the general words in Clause 1 of the deed which I have quoted, and, if not comprised therein, admittedly are not within the security. Various other defences, more or less technical, have been taken and they are comprised in the following issues:

1. Is the receiver a necessary party to this suit? 2. Did defendant in execution of his decree cause to be sold property not covered by the mortgage in his favour? 3. Is the plaintiff entitled to restrain the defendant from publishing Gupta Press Panjika or other publications mentioned in para. 2, Sch. A? 4. Are Section 47 and Order 21, Rule 78, bars to the maintainability of this suit? 5. Was sale proclamation and notice settled on notice to the plaintiff? If so, what is the effect thereof? 6. To what relief, if any, is the plaintiff entitled? On issue 5 no argument has been addressed to me by the learned Advocate-General, though he exhibited the affidavit of service of notice to the parties to the mortgage suit to settle the sale proclamation and the minutes of the Registrar when he settled the sale proclamation. But Mr. Page on behalf of the plaintiff has referred me to the observations of Fry, J., in *Willmott v. Barker* (1880) 15 Ch D 96, upon which he relies for the purpose of showing that there was no acquiescence on the part of the plaintiff. As I have said, the learned Advocate-General, though he submitted the issue and put in the relative documents, did not argue the point, and no question of estoppel being raised it does not appear to me that the plaintiff is

necessarily bound if the notification of sale actually and in fact included property which is not the subject of the security. It would, I conceive require something considerably more than mere abstention on the part of the plaintiff to enable the defendant to say that he was entitled to bring to sale in execution of his mortgage decree property which belonged to the mortgagor though it was not subject to his mortgage.

5. Taking the other issues in order, it has been argued on the authority of *Jotindra Nath v. Sarfaraj Mia* (1910) 6 IC 214 that the receiver was a necessary party to this suit. But that was a case in which the property, the subject-matter of the suit, was actually at the time in the possession of the receiver. That is not the case here, and the learned Judges observed:

It is obvious that, the receiver of the property of a party to litigation, is not a necessary party if no attempt is made thereby to interfere with the right of the receiver to the property entrusted to his care.

6. There is no question in this suit of interfering with the right of the receiver. The defendant Goho has no interest in the rights of the receiver. The receiver was the representative of the parties in the suit in which he was appointed. It may be that if this suit should succeed the property recovered should be handed back to the receiver, but that is not a matter in which the defendant Goho is interested. In my judgment this is not a case in which the receiver is a necessary party. I will pass over issue 2 because that involves a question of construction to which I shall presently return. Issue 3 is only a question of relief. With reference to issue 4 Mr. Page on behalf of the plaintiff has conceded that this suit is not maintainable and that he cannot resist the arguments advanced, but he has invited me on the authority of *Biru Mahala v. Shyamabhurn* (1895) 22 Cal 483, which is one of the authorities cited on behalf of the defendant to adopt the course then followed by the learned Judges and to treat this suit as though it were an application u/s 47, Civil P.C. As in that case, the suit has been instituted in the Court which has jurisdiction to execute the decree and by which the order for sale was made and under whose direction the sale was held. This, as pointed out there, is merely a defect in form, and I see no reason why the same course should not now be adopted; and if it is adopted the only logical course is to treat the suit from the beginning as though it were an application made on the day on which the plaint was presented. In that case no question of limitation will arise. This is admitted. A question of limitation would only arise if the suit were treated as though it were an application u/s 47 made now or on some date subsequent to that on which the plaint was presented, but I see no reason for that and I direct that this suit shall be treated as an application u/s 47, Civil P.C. made on the day on which the plaint was presented.

7. The only question which remains to be decided is whether what was sold is covered by the mortgage. What was sold was the beneficial interest in the business. That means the legal interest in the business. That does not carry anything specific. Then there was sold the goodwill in the business. Now goodwill

is something intangible and immaterial which must have some relation to something else. It was the goodwill of the business, but it is not specified as the goodwill in any publication or anything of that nature. So far as any question of any thing other than a chattel is concerned, that disposes of the matter. The second part of the clause specifically restricts the security to the chattels and things belonging to the Gupta Press concern which are described in the schedule. Admittedly nothing in Schedule 2 to the plaint is to be found in the schedule to the mortgage deed. Nothing in Schedule 2 to the plaint, in my view, is comprised within the first part of the clause which I am now considering. That being so, it follows that which is to be found in Schedule 2 to the plaint is not within the security and therefore was sold by the defendant in execution of his mortgage decree though it was property not covered by the mortgage in his favour. In these circumstances the plaintiff is entitled to relief. The defendant will restore to the receiver appointed in Suit No; 674 of 1918 the properties specified in Schedule 2 to the plaint. The plaintiff will be entitled to her costs as though this were an application made u/s 47, Civil P.C. As regards any costs which have been incurred and which would not have been incurred if an application had been filed in the first instance, both sides will bear their own costs.