**(1948) 01 PAT CK 0015**

**In the Patna High Court**

Rajib Nath Mukherjee APPELLANT

Vs

The Chota Nagpur Banking Association Ltd. Ors. RESPONDENT

**Date of Decision :** 05-01-1948

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 48
Contract Act, 1872 — Section 65

**Citation :** AIR 1948 Patna 443

**Hon'ble Judges :** Agarwala, Acting C.J.;Meredith, J

**Bench :** Full Bench

## Judgement

Meredith, J.—This is a plaintiff''s appeal under the Letters Patent from a decision of Shearer, J. sitting singly, and it arises out of a suit asking for a declaration that a sale of certain shares of the Chotanagpur Banking Association was a nullity, and asking that the names of the purchasers of the shares should be deleted from the register of share, holders and the plain, tiff''s name should be substituted.

2. The circumstances were that one Digendra Nath Mukherji, the plaintiff''s uncle, held 48 fully paid shares of the Chotanagpur Banking Association (defendant 1). On 20th July 1915, Digendra borrowed a sum of Rs. 1500 from the. Bank upon a handnote. On 15th May 1923, the Bank obtained a decree upon the handnote against Digendra''s heirs. In execution thereof on 3rd August 1935, the shares were sold through the Court and purchased by the Bank itself as decree-holder. The Companies Act of 1913 was then applicable, and u/s 55(i) of that Act, "no company limited by shares shall have power to buy its own shares unless the consequent reduction of capital is effected and sanctioned in manner hereinafter provided.

There was no reduction of capital, and apparently the Bank soon realised that a mistake had been made, and the shares were allowed to stand in the name of Digendra, while on 31st December 1935 the secretary of the Bank transferred 43 of the shares to certain Directors and their wives, the other defendants, in order to satisfy Digendra''s debt.

3. The plaintiff eventually became Digendra''s sole heir and applied for a succession certificate. For this purpose he applied for duplicates of the share'' certificates, and the Bank then informed him that 43 of the shares had been sold to others.

4. Then followed the present suit, the plain, tiff contending that the original sale was a nullity and so also the second sale in 1935 as the Bank had no power to sell Digendra''s shares.

5. The Munsif decreed the suit, and the Subordinate Judge in first appeal upheld that decision. Shearer, J. in second appeal, however, reversed the decision and dismissed the suit. He agreed with the Courts below that the purchase of its own shares by the Bank was a nullity, and that is not now disputed. He pointed out, however, that under Article 30 of the Articles of Association of the Bank, to which the share-holder must be taken to have agreed when he purchased the shares, the company had a paramount or prior lien on the shares of each member for all his debts and could absolutely sell and dispose of the shares registered in the books of the company in the name of any such debtor and apply the proceeds so far as the same would extend in discharge and satisfaction of such debts, and without any further or other consent of the holder of the shares could transfer the same in the books of the company to a purchaser. He considered in view of this that the sale by the Secretary of the Bank, though possibly subject to certain irregularities with regard to notice and so on, was a good sale, and the plaintiff as Digendra''s heir consequently had no title to the 43 shares.

6. Mr. Ganga Charan Mukherji for the appellant has urged a number of points which I shall deal with seriatim.

7. Mr. Mukherji''s first contention is that there is a definite finding by both the Courts of fact that the sale by the Bank''s Secretary did not purport to be in exercise of the right under Article SO, and it cannot, therefore, be called a sale in virtue of the lien, and it was not open to Shearer J. to say that in selling the shares on 31st December 1935 the Bank purported to be exercising the right conferred on it by Article 30 of its Articles of Association. This argument does not appeal to me because even if the sale was not expressly made under the powers conferred by Article 80, nevertheless the sale by the Bank must be attributed to those powers, and as long as the powers existed the sale would be a good sale. It is difficult to see how the Bank could have contemplated such a sale except under Article 80, because the mistake in making the purchase had undoubtedly been realised, and it was known that the purcahse was nothing, and the shares still remained the property of Digendra''s heirs. The real question is not whether the sale was expressly made under the lien, but whether, when the sale took place, the power to sell was there or not.

8 Mr. Mukherji''s second contention has much more force. He argues that when the Bank went to Court and took a decree on the hand note and sold the shares

 

in execution without any mention of the lien or attempt to rely upon it, the lien must be taken to have been abandoned. I consider this is correct. It was not merely that the Bank sued for recovery of the loan without any mention of or attempt to enforce the lien, but it even expressly purported to sell the shares free of encumbrance. Exhibit 3A is a petition filed by the decree holder on 18th April 1935 stating that there was no encumbrance on the shares. Mr. B.C. De for the respondents says this merely means that the Bank meant that the encumbrance would be put an end to upon the purchase by satisfaction of the debt; but the statement that the sale was without encumbrance was irrespective of whether the purchase price fully satisfied the debt or not, and in fact the execution case wag dismissed only on part satisfaction. In acting as it did, the Bank definitely held out to prospective purchasers that should any portion of the debt remained unsatisfied no attempt would be made to rely upon any lien upon these shares for satisfaction of the balance. In Halsbury''s Laws of England, Edn. 2, vol. 20, p. 584, Article 788, we find it stated that a lien is waived or destroyed inter alia where a party claims to retain goods on grounds different from those on which he rests his claim for lien, and makes no mention of the lien.

9. A number of cases are referred to of which I may mention Boardman v. Sill I Campbell 410. This was an action of trover for some brandy which lay in the defendant''s cellars, and which when demanded he had refused to deliver up, saying it was his own property. At this time, certain warehouse rent was due to the defendant on account of the brandy of which no tender had been made to him. The Attorney General contended that the defendant had a lien on the brandy for the warehouse rent, and that till this was tendered trover would not lie. But Lord Ellenborough considered that as the brandy had been detained on a different ground and as no demand of warehouse rent had been made, the defendant must be taken to have waived his lien, if he had one. This doctrine was affirmed in Weeks v. Henry Goods (1859) 141 E.R. (C.P.) 499. In my opinion the Bank''s conduct in the present case amounted to a clear waiver of the lien, upon which accordingly it could not afterwards rely.

10. Mr. Mukherji''s next contention, in my opinion, also succeeds. He points out that whereas the handnote was executed in July 1915 the sale relied upon did not take place until December 1935. Consequently not only had the debt become time-barred but further execution of the decree was also time-barred u/s 48, Civil P.C. Shearer J. dealt with this by pointing out that limitation merely puts an end to the remedy, but does not extinguish the right. Despite the bar of limitation, the debt continued to exist, and as long as it existed the lien subsisted and the Bank could sell in exercise of the lien, Mr. Mukherji''s answer is that all rights upon the handnote had been merged in rights under the decree. After the decree the decree-holder had no other rights than those under the decree, and consequently such rights as he had could only be exercised upon the decree, that is, by execution, and once execution became barred there remained no rignts which could be enforced in any other way. Thehen ceased with the right, for there could be, no lien once there were no longer any rights upon which it could

 

be founded. Reliance is placed upon Mohammad Abdul Rahim Khan and Another Vs. Ram Bharos Ojha and Others, . In that case it was held that after a decree upon a mortgage, the mortgage security had merged in the decree, and whatever rights the mortgagee afterwards possessed were the rights '' which he acquired under the decree. If owing to her own default she allowed her remedy under the decree to be barred by time the had no longer any other rights to which effect could be given. Reliance was placed upon the Privy Council case in Het Hem v. Shadi Lal AIR 1918 PC 34 wherein their Lordships had pointed out that when a mortgagee obtained a decree, that decree was a substitute for his rights under the mortgage and when the right to execute the decree became barred by time the decree ceased to be operative.

11. In the same way it seems to me that in the present case the right upon the handnote, which formed the foundation of the lien, ceased to exist once the decree was obtained; and became rights under the decree which could be enforced only by execution, and once execution became barred there remained no other means of enforcing them.

12. On both these points the appeal must, in my opinion, succeed, and it consequently becomes unnecessary to consider Mr. Mukherji''s remaining two points, namely, that the decree must be regarded as satisfied by the sale unless and until the sale be set aside or judicially declared a nullity. This had not been done in 1935, and consequently the Bank had no right or lien to enforce it. Secondly, that a lien of this type, which he characterised as an active lien which can be used for attack by sale as well as in defence, can only be exercised within the period of limitation.

13. The defendants other than the Bank have appeared separately before us and argued that as bona fide purchaser for value, if the sales to them be set aside, they are entitled to compensation from the plaintiff or from the Bank u/s 65, Contract Act and under Schedule 1, Table A, Regn. 11, Companies Act. No such questions, however, appear to have been agitated before the Courts below. Questions of fact are involved, whether the sales were bona fide, whether consideration was paid, and so on, and such a point cannot be permitted to be raised for the first time in Letters Patent appeal. These defendants must seek their remedy, if any elsewhere.

14. I would allow this appeal, set aside the decision of Shearer J. and restore that of the learned Munsif with costs throughout.

Agarwala Ag. C.J.

I agree.

 