(1939) 10 FED CK 0001

In the Federal Court

Ramnandan Prasad Narain Singh and Anr. APPELLANT

Vs

Goshwami Madhwanand Ramji RESPONDENT

Date of Decision : 09-10-1939

Acts Referred:

Citation : AIR 1940 FC 1

Hon'ble Judges : Justice Maurice Gwyer,Justice Shah Sulaiman,Justice Srinivasa Varadhachariar

Bench : Full Bench

Judgement

Sulaiman, J.—This is an appeal by the judgment-debtors arising out of proceedings in execution of a simple money decree, dated 11th

March 1935, (confirmed on appeal by the High Court on 6th January 1938) for about Rs. 15,000 passed on the basis of two promissory notes

dated 6th October 1931, on which date a mortgage deed for Rupees 42,000 was also executed'' in favour of the creditor. On 12th September

1938, the judgment-debtors filed an application under Sees. 11 and 16, Bihar Money-lenders Act (Act 3 of 1938), also purporting to be an

objection under Section 47, Civil P.C. Their complaint was that in the execution case the properties were attached and sought to be sold ""subject

to the said mortgage lien"". They urged that in view of the provisions of Section 11 of the Bihar Act the amount claimed to be due under the

mortgage deed was not in fact due, and so the properties could not be sold subject to that lien, and should therefore be valued free from that lien.

The reply, dated 5th November 1938, filed by the decree-holder, was to the effect that inasmuch as Section 16 of the Bihar Act had been

declared null and void, no inquiry into the valuation of the properties could be made and the objection should, therefore, be dismissed.

2. The learned Subordinate Judge understood the objection to mean that the value of the properties should be assessed and that it be declared that

the mortgage deed, subject to which the decree-holder wanted to sell the same, should be held to have been satisfied on account of the provisions

of Section 11, Provincial Act. As regards the validity of Section 16, after pointing out that under Order 21, Rule 17 of the Code in the case of a

decree for payment of money the value of the property shall, as nearly as may be, correspond to the amount due under the decree, he held the

Section to be void because of the ruling in 19 PLT 760. Vishwanath Narayan v. Harihar Gir (1989) 26 AIR Pat 90 As regards the applicability of

Section 11, he held that:

This plea of the judgment-debtors cannot be entertained in these proceedings as the validity or satisfaction of the mortgage bond to which the

properties are admittedly subject cannot be a matter for consideration in this execution case. The mortgage encumbrance will be notified as usual,

without deciding as to the correctness of the amount said to be due under it.

3. He further pointed out that the judgment-debtors would later be entitled to sue for the redemption of the mortgage and show whether the

mortgage money was satisfied or not. Unfortunately the objection and the reply thereto do not make it quite clear whether the sale had been

ordered ""subject to the mortgage"" as contemplated by Order 21, Rule 62, Civil P.C., or whether the previous mortgage had been merely notified

as contemplated by Rule 66 of that Order. The learned Counsel for the appellants has, however, conceded that there had been no adjudication

under Rule 62. The order of the Subordinate Judge also made it clear that the mortgage was to be merely notified. The judgment-debtors appealed

to the High Court and again raised the question of the applicability of Sections 11 and 16, Bihar Act. Section 11 had presumably been invoked for

the purpose of getting the true value of the property estimated under See. 16. The High Court felt bound by its two previous decisions holding that

these Sections were void, and summarily dismissed the appeal.

4. As regards the applicability of Section 16, I expressed the view in 1939 FCR 193 Shyamakant Lal v. Rambhajan Singh (1939) 26 AIR FC 74

which had turned solely on that Section, that the order of the High Court relating to it was not a final order within the meaning of Section 205(1), Government of India Act. As in that case the new Act, of which the appellants wanted to take advantage in the appeal instead of relying upon it

later in the first Court, had come into force after the appeal had been filed. I preferred to base my conclusions both on the ground that the

repugnancy had been removed by the assent of the Governor-General to the new Act and that Section 16 had not in fact been repugnant to Order

21, Rule 66, Civil P.C., as amended by the Patna High Court. I am now bound by the opinion of the majority that an appeal lies even from the

order of the High Court under Section 16, Provincial Act. As regards an order under Section 11 of the Act, there can be no doubt that when

passed, it would involve a determination of the right of the decree-holder and the liability of the judgment-debtor, and such a determination being

embodied in the decree passed in the suit would be a judgment within the meaning of Section 205, Government of India Act, and of course also a

decree. The difficulty which-I feel in this case is that the stage for a decree in conformity with Section 11 has not yet arrived as no suit for the

enforcement of the mortgage has yet been filed.

5. If all that has happened in the execution proceedings is that the decree-holder has asked that his previous mortgage should be notified, and

accordingly the proclamation of sale merely announces the existence of that encumbrance and there has been no determination by the execution

Court under Order 21, Rule 62, Civil P.C., that the property is really subject to such mortgage, then the order would not be any final order in the

case, much less a judgment or a decree. I would then be inclined to hold that such an order in itself could not be the subject- matter of an appeal

either to the High Court, or to the Federal Court. On the other hand, had the execution Court held that the attached properties were subject to the

mortgage, and should be sold subject to the subsisting charge, and the judgment- debtors'' objection has been thrown out on the ground that they

cannot avail them-selves of the provisions of See. 11 because they are void, then there might be a determination of a question between the decree-

holder and the judgment-debtors within the meaning of Section 47, Civil P.C., in which case the order would be a decree within the meaning of

Section 2, Civil P.C., or at any rate a final order within the meaning of Section 205, Government of India Act. The. order declaring the validity of the mortgage might then be final and binding on the judgment-debtors in a suit for redemption that they may bring or any suit that may be brought

by the mortgagees hereafter. If, however, the appeal lies because of the order under Section 16, then the validity of Section 11 can be equally

considered under Section 205 (2), Government of India Act, specially as in estimating the value of the mortgaged properties the amount due on the

mortgage has to be ascertained. I am inclined to think that the provisions of Section 11 affected ""the jurisdiction and powers,"" of the Courts both

with respect to ""contracts"" or ""transfer of property"" (List III Nos. 10 or 8 and 15) and ""moneylending"" (List II Nos. 27 and 2). But the repugnancy

to the existing Indian laws has been cured by the Governor-General''s assent to the new Act, which re-enacted the same provisions in Section 7.

Gwyer, C.J.

6. The material facts have been set out in the judgment which has just been delivered. The case is clearly governed by the decision of this Court in

1939 FCR 193 Shyamakant Lal v. Rambhajan Singh (1939) 26 AIRFC 74 both as regards the maintainability of the appeal and as to the order to

be passed. According to that judgment, the relief which the appellants claimed in the Courts below under Sections 16 and 17, Bihar Money-

lenders Act, 1938 (No. 3 of 1938), is now available to them under Sections 13 and 14, Bihar Money-lenders (Regulation of Transactions) Act,

1939 (No. 7 of 1939), the validity of which there is no ground for questioning. The decree-holder sought to have the appellants'' properties sold

subject to a mortgage which he held over them and in the Courts below the appellants claimed that in calculating the amount due to the decree-

holder under the mortgage they should have the benefit of Section 11 of the Act, 1938. As Section 11 has now been re-enacted as Section 7 of

the Act of 1939, the appellants are entitled to claim the benefit of this provision in the new Act when the executing Court proceeds under Section

13 to determine the value of the properties to be sold. In these circumstances, it appears to my brother Varadachariar and myself unnecessary to

consider whether or not Section 11 of the Act of 1938 was void and we express no opinion upon it.

7. It is, in our opinion, equally unnecessary to decide whether this appeal would have been competent if it had not raised the question under

Section 16 of the Act of 1938. We agree that, according to the previous decision of this Court, the appeal is maintainable so far as it relates to the

appellants'' claim under Section 16 of the Act of 1938 (now Section 13 of the Act of 1939) and we also agree that if the appeal is to this extent

competent, the order of the High Court so far as it relates to Section 11 of the Act of 1938 (now Section 7 of the Act of 1939) can also be dealt

with in this appeal, as in estimating the value of the attached properties the amount due on the mortgage has to be ascertained. The case will be

remitted to the High Court with a direction to discharge their order dated 9th February 1939, and the lower Court''s order dated 18th November

1938, and to give liberty to the appellants to file an application under Section 13, Bihar Moneylenders (Regulation of Transactions) Act, 1939.

There will be no order as to costs.