

(1997) 02 CAL CK 0017

In the Calcutta High Court

Case No : Civil Appellate Jurisdiction F.M.A.T. No. 1987 of 1997

SantoshThakur

APPELLANT

Vs

Allahabad Bank of India (sic)

RESPONDENT

Date of Decision : 05-02-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2

Citation : (1998) 1 CALLT 408

Hon'ble Judges : Satyabrata Sinha, J; Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : Mr. Shakti Nath Mukherjee, Mr. Sudish Das Gupta, Mr. Subra Kamal Mukherjee and Mr. Sushanta Kr. Basu, for the Appellant; Mr. Jayanta Mitra and Mr. Dilip Kumar Mondal, for the Respondent

Judgement

B. Bhattacharya, J.—This appeal is at the Instance of the defendant No.2 and is directed against Order No.55 dated June 7, 1997 passed by the Assistant District Judge. 4th Court, Alipore in Title Suit No. 19 of 1992 whereby the learned trial Judge allowed two applications filed by the respondent No. 1, one for Injunction and the other for appointment of Receiver,

2. The aforesaid title Suit No.19 of 1992 was filed by the respondent No. 1 against the appellant and opposite party Nos. 2 to 4 thereby praying. inter alia, for recovery of money and for enforcement of hypothecation and mortgage. The prayer portion and the schedule annexed to the plaint are quoted hereunder :--

"(a) Decree for Rs. 8.99,793.56 against the defendants jointly and severally; alternatively as regards defendants Nos.3 and 4 an enquiry into their respective liability to the plaintiff and a decree against each of them for the sum found due on such enquiry;

(b) Interest from February 16, 1992 till filing of the suit, interim interest and interest on judgment at 21 per cent per annum;

(c) Declaration that the suit properties mentioned in Schedule-I hereunder

remain hypothecated and those mentioned in Schedule-11 hereunder remain mortgaged to the plaintiff for payment of the plaintiffs' claims herein;

(d) Decree for sale and/or realisation of the suit properties mentioned in Schedule-1 hereunder by public auction or private contract with liberty to the plaintiff to appropriate the net proceeds thereof in protanto satisfaction of the plaintiffs' claims herein:

(e) Decree under Order 31 Rule 4 of the CPC 1908 in Form 5A of appendix-D to the First Schedule thereof or in any other Form or provisions of law as this learned court may seem fit and proper in respect of the mortgaged property mentioned in Schedule-11 hereunder;

(f) Receiver:

(g) Injunction;

(h) Costs;

(i) Further any other reliefs as the plaintiff is entitled to in law and in equity".

SCHEDULE-I

Schedule of goods and Assets Hypothecated

All that stocks of consumable goods both present and future book debts, other movable property etc. lying at the defendants business premises-12. Kailash Bose Street, Calcutta-6, and at 29, Sadananda Road, Calcutta-26.

SCHEDULE-II

Schedule of the Mortgage Properly

All that the piece and parcel of land with structure thereon situated at premises No.29, Sadananda Road, Calcutta-26 containing 880 sq. ft. covered areas in the western side of the ground floor having a common passage of 8 ft. wide consisting of three bed rooms, one study room, one drawing room, with dining space, one kitchen and two bath rooms, and the said premises is butted and bounded :

By the North : Property of Sri Blswanath Ghosh & Ors.

By the South : Property of Sri Nital Das and Ors.

By the East : Factory and after that Metro Railway.

By the West : Sadananda Road."

3. The case made out by the respondent No.1 in the aforesaid suit was that the appellant as a partner of respondent No.2 took loan from the bank by mortgaging his Immovable property situated at Premises No 29, Sadananda Road, Calcutta 26 and hypothecated all stocks of consumable goods both present and future, and other moveable properties. The total claim of the respondent

No.1 with interest calculated upto February 15, 1992 amounted to Rs. 8,99,793.55. In spite of demands the appellant and the respondents No.2 to 4 failed to pay the aforesaid amount. Hence the suit.

4. The appellant is contesting the aforesaid suit by filing a written statement denying the material allegations made in the plant.

5. In connection with the aforesaid suit the respondent No.1 sometime in the month of April, 1996 filed two applications, one for temporary injunction and another for appointment of Receiver. The case made out by the respondent No.1 in the aforesaid two applications was that on or about February 13, 1996 the official of the respondent No.1--bank visited the suit premises viz. the mortgage property which is mentioned in Schedule-II of the plaint. At that point of time it was detected that the said mortgage property with the old structures standing thereon was totally demolished and new multi-storied building was erected thereon containing various flats and appartments without giving any prior Intimation to the respondent No.1--bank. On spot enquiry it was further detected that the said old existing structure at the suit premises was demolished in order to construct a new building by a local promoter without any Information or approval of the bank.

6. Thus, the respondent No. 1 prayed for appointment of a Receiver to take possession of the suit property being premises No. 29. Sadananda Road, Calcutta-26 and also prayed for temporary injunction restraining the appellant and other respondents from transferring, alienating, disposing or selling out premises No. 29 Sadananda Road or flat and appartment constructed therein or any portion thereof to any person Including the Intending purchasers, if any, till the disposal of the suit.

7. The present appellant contested the aforesaid two applications by filing written objections thereby denying the allegations made in the applications for temporary Injunction and for appointment of Receiver respectively.

8. The learned trial Judge by order No.42 dated August 20. 1996 was pleased to allow the said prayer for temporary Injunction thereby restraining the appellant herein from transferring, alienating, disposing of or selling out premises No.29, Sadananda Road, Calcutta to any person or any persons Including purchasers till the disposal of the suit. So far as the application for appointment of Receiver filed by the respondent No.1 was concerned, the learned trial Judge by order No.44 dated August 20. 1996 was pleased to reject the same as according to the learned trial Judge there was no averment in the petition for appointment of Receiver that the defendant No.2 has already entered into an agreement for selling out the flats and appartments. According to the learned trial Judge, the question of collecting consideration money would arise only at the time of payment of such money.

9. It may further be mentioned here that at that point of time, the learned trial Judge by Order No.43 dated August 20, 1996 was pleased to allow the prayer of

respondent No.1--bank for appointment of an Advocate Commissioner for local inspection for the purpose of ascertaining the extent of construction made on the suit premises. Pursuant to the said order a Commissioner was appointed who had submitted report stating that already a five storied building had been constructed and electric and water connections had also been taken therein.

10. The respondent No.1, it appears, did not prefer any appeal against the aforesaid order rejecting its prayer for appointment of a Receiver. The appellant also did not prefer any appeal against the order granting injunction in favour of the respondent No.1-bank whereby the appellant was restrained by an order of injunction from transferring, alienating, disposing of or selling out the said premises,

11. Subsequently in the month of March, 1997 the respondent No.1 filed two fresh applications one for temporary injunction and other for appointment of Receiver. In the application for injunction the respondent No.1 prayed for an injunction restraining all the defendants particularly defendant No.2 and his agents from changing the nature and character of the suit property by making any further construction and from giving delivery of possession of the flats or apartments in premises to any person or persons including the intending purchasers. In the application for appointment of Receiver the respondent No.1 prayed for appointing a Receiver in terms of Order 40 Rule 1 of the Code of Civil Procedure. In addition to that the respondent No.1 prayed for a direction upon the Receiver to take possession of the mortgage property and also for a direction to collect sale consideration money received or to be received from intending buyers of the flats.

12. It may be mentioned here that in the aforesaid two applications no new material was disclosed by the respondent No.1 apart from the fact stated in the earlier applications for temporary Injunction and appointment of Receiver. In the second application for appointment of Receiver, the respondent No.1 even did not disclose the name of any intending purchaser nor was any agreement alleged to have been entered into by appellant herein with any promoter filed in support of the later applications.

13. The learned trial Judge by the order impugned has allowed both the applications filed by the respondent No.1. By the first part of the ordering portion, the learned trial Judge restrained the defendants from dealing with the suit property in any manner till the disposal of the suit. By the second part of the said order the learned trial Judge allowed the application under Order 40 Rule 1 of the CPC filed by the respondent No.1 thereby appointing the Manager of the respondent No.1 as Receiver without any remuneration. By the said order, the Receiver was directed to take possession of the mortgaged property as described in Schedule-11 of the plaint Including undivided 880 sq. ft. belonging to defendant No.2 in respect of premises No.29, Sadananda Road. It was further ordered that the Receiver would be at liberty to collect sale proceeds from the Intending buyers of the flat and land and he should deposit the same to the

extent of Bank's dues in order to protect the interest of the Bank.

14. Being dissatisfied with the aforesaid order passed by the learned trial Judge the defendant No.2 has preferred the Instant First Misc. Appeal.

15. Mr. Dasgupta, the learned counsel appearing on behalf of the appellant has made two fold submissions.

16. The first contention of Mr. Dasgupta is that previously the application for appointment of Receiver filed by the respondent No.1--Bank having been dismissed and the bank having preferred no appeal against the said order, the second application for appointment of Receiver on the self-same allegation was liable to be dismissed, the same being barred by the principle analogous to res judicata.

17. The second contention raised by Mr. Dasgupta is that the trial court by the self-same order having restrained the appellant and the other defendants from transferring, or alienating any portion of the suit property, there was no occasion for appointment of a Receiver for the purpose of collecting sale proceeds from the intending buyers. Thus, according to Mr. Dasgupta. the order was self-contradictory and the same was liable to be set aside. Mr. Dasgupta contends that his client having been restrained even by an earlier order from transferring, alienating, disposing of or selling out the suit property, the interest of the respondent No. 1 was well protected and as such there was no necessity for appointment of a Receiver over the suit property. It goes without saying that the suit property does not fetch any rent whatsoever.

18. Mr. Mitra, the learned counsel appearing on behalf of the respondent No. 1 has supported the Impugned order and has tried to convince us that mere order of temporary injunction restraining the appellant from transferring, alienating, disposing or selling out the suit property was not sufficient. According to Mr. Mitra, if inspite of such injunction order, the appellant sells away any part of the suit property in that event third party's Interest will be created in the suit property and there will be multiplicity of proceeding. Thus, according to Mr. Mitra, to safeguard the interest of the respondent No. 1 the learned trial Judge rightly passed an order of appointment of Receiver. Mr. Mitra, further contends that rejection of previous application for appointment of Receiver did not preclude his client from filing a fresh application on the changed circumstances and the same cannot be hit by the doctrine of res Judicata or any principles analogous thereto. Mr. Mitra has relied upon a number of decisions to show that even in a mortgage suit, a court can for the purpose of protecting a mortgage's interest appoint a Receiver over the mortgage property.

19. After hearing the learned advocates for the parties and after going through the materials on record we find substance in both the contentions raised by Mr. Dasgupta. It appears from the record that in the month of April 1996 the respondent No. 1 on the self-same allegation filed two applications, one for appointment of Receiver and another for temporary injunction. The application

for temporary injunction was allowed but application for appointment of Receiver was dismissed on the ground that no particular was given in the said application disclosing any agreement which the appellant had entered into with anybody as alleged in the application. We have gone through the second application for appointment of Receiver. In the said application also the respondent No.1 disclosed no particular agreement which the appellant has entered into with anybody nor was there mention of any particular Intending buyer. The respondent No. 1 also could not disclose any material wherefrom it would appear that appellant in violation of the earlier order of Injunction had transferred any of the flats to any outsider. Thus, the second application for appointment of Receiver does not contain any fresh allegation. It goes without saying that when the earlier application for appointment of Receiver was disposed of, by that time the five storied building was already complete. Thus, in our opinion, the respondent No. 1 not having preferred any appeal against the rejection of its prayer of appointment of Receiver earlier, on the selfsame allegation the successor of the trial Judge cannot appoint a Receiver over the suit property as the same is hit by the doctrine of res judicata or principle analogous thereto. The learned trial Judge in repelling the contention that the second application for appointment of Receiver is barred by the principle of res Judicata, has relief upon a decision of Orissa High Court reported in Anirudha Adhikari Vs. Amarendra Adhikari, It will appear from the said decision that in that case, before passing of preliminary decree an application for appointment of Receiver was made and the same was rejected. After passing of preliminary decree the plaintiff filled a second application for appointment of Receiver and the same was allowed. The learned Judge held that after the passing of the preliminary decree the share of the plaintiff has been declared and, thus, his right has been established. According to the learned Judge, the passing of a preliminary decree was Itself a changed circumstance and as such the second application for appointment of Receiver was not barred. In the case before us, in the month of August 1996, the previous application for appointment of Receiver was rejected and after the lapse of seven months, the plaintiff filed a fresh application for appoint of Receiver and that too not on the basis of any additional material. Thus, the first contention raised by Mr. Dasgupta should succeed.

20. In our opinion, this appeal should be allowed also on the ground that in the facts and circumstances there was no necessity of appointment of a Receiver as contended by Mr. Dasgupta. We have already stated that in this case there is already an order of Injunction restraining all the defendants from transferring, alienating, disposing of or selling out the suit property. The respondent No.1 could not place any material to show that the appellant had violated the said order of injunction. In the first part of the ordering portion of the Impugned order the learned trial Judge has again restrained all the defendants from dealing with the suit property in any manner till the disposal of the suit. After passing of such an order, we fail to understand what prompted the learned trial Judge to appoint a Receiver for taking possession of the suit property and that too for the

purpose collecting sale proceeds from the Intending buyers of the fiat and land. By the second part of the order if the learned trial Judge Intended that the defendants would be restrained from dealing with the property but it would be open to the Receiver to sell the suit property, in that event also, the order is liable to be set aside inasmuch as we cannot approve of sale of the mortgage property even before passing of a preliminary decree. According to the respondent No.1, the appellant No.2 mortgaged his right in 29, Sadananda Road, Calcutta for the purpose of the alleged loan. From the deed that has been deposited with the bank it appears that 29, Sadananda Road was a three storied building on 6 cottahs of land and the father of the appellant who was the original owner of the suit property gifted only a portion thereof viz. 880 sq. ft. of structure in the ground floor along with the same amount of proportionate share in the land to the appellant. Thus, the appellant had subsisting right only in the three rooms and verandah etc. on the ground as mentioned in the said deed of gift. When the entire suit property was demolished, the respondent No.1-bank remained silent. The bank woke up from its slumber after the said building was entirely demolished and a new multi-storied building consisting of five floors was complete. Therefore, under such circumstances when admittedly there are other co-sharer of the suit property and the mortgage was restricted only to a limited portion of the building, in our opinion, it was not proper on the part of the learned trial Judge to appoint a Receiver to take possession of the entire building of which the appellant is only a co-sharer. The other co-sharers of the building are not parties to the instant proceeding. Thus, it was not a wise decision on the part of the learned Judge to appoint a Receiver over the entire suit property at 29, Sadananda Road, Calcutta-26 and that too for the purpose collecting sale proceeds from the Intending purchasers.

21. Thus, we are left with no other alternative but to set aside the order impugned whereby the learned trial Judge appointed a Receiver over the suit property. We however, make it clear that the appellant or his men and agents will not change the nature and character of the suit property any further and at the same time will also not encumber the same in any way whatsoever. We are given to understand that the suit is already fixed for peremptory hearing. We, thus, direct the learned trial Judge to dispose of the suit within a month from date without granting any unnecessary adjournment to either of the parties.

22. The appeal is allowed, the order Impugned is hereby set aside to the extent as Indicated above.

23. There will be however no order as to costs.

S.B. Sinha, J.

24. While agreeing fully with my learned Brother I would like to add a few words of mine.

25. There cannot be any doubt whatsoever that the mortgagee can exercise his right in terms of the provisions of sections 65, 66 and 66A of the Transfer of

Property Act and as has been held in *Arun Agencies, Mattancherry Vs. St. Antony's Oil Mill and Others*, , *Amarnath Ghose Vs. Abhoy Kumar Singh and Others*, and *Rameswar Singh Bahadur v. Chuni Lal Shaha* reported in AIR 1920 Cal. 545.

26. It is also not disputed that in a mortgage suit a Receiver may be appointed. There is no quarrel with the proposition laid down in *Bukhtiarpur Bihar Light Rly. Co. Ltd. Vs. State of Bihar and Others*, , *Industrial Finance Corporation of India and Another Vs. Thakur Paper Mills Ltd. and Another*, and *Chaganlal v. Ramnarayan* reported in 1956 Madhya Bharat 244.

27. But it is also a trite law that a Receiver cannot be appointed on mere asking. The court has to consider the fact of each matter and arrive at a conclusion on the basis of the materials placed before it as to whether it is Just and convenient to appoint a Receiver.

28. In *T. Krishnaswamy Chetty Vs. C. Thangavelu Chetty and Others*, a learned single Judge has laid down five principles which must be borne in mind before a Receiver is appointed wherein it has been held :--In *State Bank of India Vs. Jayshree Ceramics Pvt. Ltd. and Others*, this court has again laid down the principles of appointment of receiver.

For the purpose of appointment of a Receiver strong prima facie case is required to be made out. See 1976 BBCJ 521.

29. In the Instant case as has been noticed by my learned Brother the plaintiff neither on facts nor in law were entitled to an order of appointment of Receiver. The learned trial Judge has also not applied his mind as regard fulfilment of the said principles.

30. Moreover, in this court's opinion keeping in view the fact that an order of injunction has already been issued in favour of the plaintiff which sub-serves the Interest of Justice not only the order appointing a receiver is Illegal but also unwarranted.

31. Furthermore, this court cannot uphold an order which is self-contradictory in nature. In view of the order of injunction passed by the learned Judge himself the order of appointment of receiver is inherently inconsistent. This court although in a given case may not lightly set aside an order of appointment of Receiver passed by the learned trial Judge, we have no hesitation to set aside the said order as the same is not only contrary to the principles of law but also is contradictory to and inconsistent with the order of Injunction passed by the said learned court itself.

32. Appeal allowed