

(1936) 01 CAL CK 0031

In the Calcutta High Court

Case No : Appeal from Original Decree No. 55 of 1934

Sarada Churn Goho

APPELLANT

Vs

Prativa Sundari Debi and Others

RESPONDENT

Date of Decision : 14-01-1936

Acts Referred:

Citation : (1936) 01 CAL CK 0031

Final Decision : Allowed

Judgement

Costello, J.—This is an appeal against a judgment [See 38 C.W.N. 996 (1934)] of Mr. Justice Buckland given on the 20th of March, 1934, at a time when he was Acting Chief Justice of this Court. The judgment was given in suit No. 2186 of 1931 which was a suit in which a lady named Protiva Sundari Debi was asking for a declaration that a sale held by the Registrar of this Court on the 25th of September, 1931, was not binding. That sale had taken place in execution of a mortgage decree obtained by one Sarada Churn Goho in suit No. 1120 of the year 1927. In this suit there had been the usual final decree; directing the mortgaged properties to be sold. The Plaintiff in the present proceeding complains that the mortgagee Sarada Churn Goho wrongfully and fraudulently caused to be sold properties which were not included within the mortgage and that the mortgagee himself purchased the properties which were sold for a sum of Rs. 17,000 knowing full well that the more valuable properties were not included in the mortgage and so could not lawfully be sold. The Schedule to the plaint in the present proceeding sets out a list and the descriptions of various properties which were, in fact, comprised in the sale. The Plaintiff contends that only the properties enumerated in Part I of the schedule property fell within the mortgage and they were the only properties which could lawfully be sold and that all the properties comprised in Part II of the Schedule did not come within the mortgage and, therefore, ought not to have been sold at the sale of the 25th of September, 1931. The most important of the items in Part II of the schedule is the last one which is described in this way?" " The Gupta Press Panjika " and other publications." It is necessary to refer to the mortgage itself in order to see

how far the allegations of the Plaintiff are justified. The material portion of the mortgage for our present purposes is paragraph 1 which says:

In consideration of the sum of Rupees thousand paid to the mortgagor by the mortgagee (the receipt whereof the mortgagor hereby acknowledges) the mortgagor hereby assigns unto the mortgagee": first 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 the singular the several chattols and things belonging to the said Gupta Press concern and specifically described in the schedule hereto annexed by way of security for the payment of the sum of Rupees five thousand and interest thereon at the rate of 12 per cent. per annum as hereinafter mentioned.

2. In the schedule referred to, only certain chattels in the shape of various machines and types in stock are set out. The Defendant contends that the language of paragraph J of the mortgage is sufficiently wide to comprehend all the items set out in the schedule to the plaint including the last item, as I have stated, described as " " the Gupta Press Panjika" and other publications."

3. The issues which were raised at the trial in the present suit are set out by the learned. Judge in his judgment in this form:

1. Is the Receiver a necessary party to this suit?
2. Did the 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 II of Schedule A.--
4. Are sec. 47 and Or. 21, r. 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?

4. It is desirable that I should say a word to make it clear how it came about that the learned Judge put in the first of those issues. The present Plaintiff and the third Defendant Himangshu Shekhar Gupta were the joint owners of a half-share in a printing press situate at No. 221, Cornwallis Street, which was known as the " Gupta Press." They were also said to be the owners of the copy-right in the Panjika which was known as the " Gupta Press Panjika " and certain other publications. The Defendant Susila Bala Debi was entitled to the other half of the press and the Panjika and so forth. In the year 1928, Susila Bala Debi brought a suit in this Court against the husband of the present Plaintiff Sudhanshu Shekhar Gupta and Himangshu Shekhar Gupta for partition, accounts and other reliefs. In effect that was what is ordinarily called a partnership action. In that suit on the 28th of June, 1918, Mr. Nripendra Nath Bose, who is a member of the Bar, was appointed Receiver. It was a part of the terms of his appointment that he should

sell, the Gupta Press with its good-will, lease-hold rights, machinery, stock-in-trade and so forth as a going concern. On the 20th of December, 1923, rather more than five years later, the Receiver was, by consent, directed to print the Panjika for the year 1331 B. S. and for that purpose to raise a sum of Rs. 5,000 at twelve per cent. on the security of the Gupta Press concern. It is obvious that the Receiver for some reason or other did not carry out the direction to sell the press as a going concern but was in effect carrying on the concern as its manager. It was in pursuance of the directions given on the 20th of December, 1923, that the mortgage, the basis of the sale with which we are now concerned, was entered into on the 8th of August, 1924. By that mortgage the Receiver borrowed a sum of Rs. 5,000 from the Defendant Sarada Churn Goho. It is a little difficult to see how in the circumstances of the case the learned Judge took the view that the Receiver was not a necessary party in the present suit because, to all intents and purposes, the Receiver was the mortgagor and as such was vitally interested in the sale which took place, as I have said, as a result of the final decree in the mortgage suit. In my opinion, in the circumstances of the case it is certainly desirable, if not essential, that the Receiver should have been made a party to these proceedings.

5. With regard to the second issue " Did the Defendant in execution of his decree cause to be sold property not covered by the mortgage in his favour?" The answer to that depends upon the interpretation to be put upon the terms of clause 1 of the mortgage. The learned Advocate-General has argued that those terms are sufficiently wide to include and were intended to include the Gupta Press Panjika and the copyright of that publication. It is, however in my view of the matter, not necessary that we should express a definite opinion on that point, because this appeal can be disposed of upon the footing of the last of the five issues. As regards the 4th issue it is to be observed that sec. 47 of the CPC provides that:

all questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

6. The question whether the sale of the 25th of September, 1931, was binding or not was clearly a question arising between the parties in suit No. 1120 of 1927, that is to say, the parties in the mortgage suit. As such, it should have been determined by the Court executing the decree, that is to say, the mortgage decree and not by a separate suit at all. The present proceedings were a separate suit and the learned Judge upon this point said:

With reference to issue No. 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 Mahata v. Shyama Charan Khawas* ILR 22 Cal. 483 (1895), 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 under sec. 47 of the Code of Civil Procedure.

7. Then the learned Judge said:

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. It is, as pointed out there, 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 upon which the plaint was presented. In that case no question of limitation will arise.

8. No doubt the learned Judge had in mind--probably his attention was drawn to it--sub-sec. (2) of sec. 47 of the CPC which says that:

the Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional Court-fees.

9. It is quite true that the whole of sec. 47 does apply to proceedings on the Original Side of this Court but the provision of sub-sec. (2) relating to payment of any additional court-fees seems to indicate that the framers of the section had chiefly in mind proceedings instituted in mofussil Courts rather than proceedings instituted in the High Court of Judicature at Fort William in Bengal; and, speaking for myself. I doubt very much whether the learned Judge in the circumstances of this case was altogether justified in treating the suit instituted on the Original Side of this Court as if it were a proceeding instituted under sec. 47 of the Code of Civil Procedure. However, the case relied upon by the learned Judge was some authority for the course which he adopted and had this matter rested entirely upon the question whether the learned Judge was justified in treating the suit as a proceeding it would have been difficult, if not impossible, to say that the decision arrived at by him and the course which he took was wrong.

10. We can, as already stated, dispose of this case on the basis solely of the 5th issue stated by the learned Judge--

Was sale proclamation and notice settled on notice to the Plaintiff? If so, what is the effect thereof.

11. Now, we are told that the sale notification was advertised in the ordinary way through a large number of newspapers. It must be taken, therefore, that the present Plaintiff had full knowledge of what it was that the Registrar proposed to sell on the 25th of September, 1931. The sale notice is set out at page 25 of the paper-book and the properties to be sold were described thus :

All Printing machines, Types, Imposing Surface, Chases, Composing Sticks, Type Cases, Composing Frames, Case Backs, Galley Racks &c. and Good-will of the "Gupta Press." For particulars apply to the undersigned or to Messrs. H. N. Dutta

and Co.

and it was signed by Mr. Ghatak who was then officiating as Registrar of this Court. The minutes of the proceedings before the Registrar prior to and including the actual sale are set out at pages 56 to 58 of the paper-book. First of all is valuer was appointed in the ordinary course and then on the 8th September, 1931, in the presence of Mr. A. K. Ghose and Mr. S. M. Dutt, the Registrar settled the conditions of the sale, notification of the sale and the sale notice and a list of publications in which the sale notification was to be advertised. There seems to be no doubt whatever that the Plaintiff or her attorney was fully cognisant of all that was taking place. Therefore the first part of the 5th issue as settled by the learned Judge should be answered in the affirmative. Then the only outstanding question is " What is the effect thereof ?" We are of opinion that the effect of that was that the Plaintiff could not afterwards impeach the sale. The matter is covered by the decision in the case of T. R. Arunachellam Chetti v. R.R.M.A.R. Arunachellam Chetti (2) which came before the Privy Council in the year 1888 in an appeal from the High Court of Madras and is reported in L.R. 15 IndAp 171. In that case Sir Richard Couch who delivered the judgment of the Board said at page 174:

It would be very difficult indeed to conduct proceedings in execution of decrees by attachment and sale of property if the judgment-debtor could lie by and afterwards take advantage of any misdescription of the property attached, and about to be sold, which he knew well, but of which the execution creditor or decree-holder might be perfectly ignorant--that they should take no notice of that, allow the sale to proceed, and then come forward and say the whole proceedings were vitiated. That, in their Lordships' opinion, cannot be allowed, and on that ground the High Court ought not to have given effect to this objection.

12. For the reasons given by Sir Richard Couch and on general principles we are of opinion that in the present case the objection raised by the present Plaintiff ought not to be allowed. In these circumstances we must, with regret, come to the conclusion that the learned Judge was wrong in holding that the Plaintiff was entitled to the reliefs claimed. This appeal must, therefore, be allowed with costs.

Derbyshire, C.J.

I agree.