

(1917) 08 CAL CK 0042
In the Calcutta High Court

Satish Ranjan Das

APPELLANT

Vs

Mercantile Bank of India, Ltd.

RESPONDENT

Date of Decision : 27-08-1917

Acts Referred:

Citation : 48 Ind. Cas. 322

Hon'ble Judges : Lancelot Sanderson, C.J.; John Woodroffe, J

Bench : Division Bench

Judgement

Lancelot Sanderson, C.J.—This is an appeal by the defendant, Mr. S.R. Das, against the judgment of Chaudhuri, J., whereby he held that the plaintiff Bank was entitled to a personal decree against the 1st and 2nd defendants.

2. It was contended that the plaintiffs were not entitled to a personal decree under Order XXXIV, Rule 6 of the Code of Civil Procedure, inasmuch as the conditions precedent entitling them to ask for such a decree had not been fulfilled : and the terms of the decrees, dated 8th February 1915 and 28th February 1916, had not been carried out.

3. The facts were as follows:

H. Guznavi was indebted to the Allahabad Bank and his indebtedness was secured by mortgage of certain properties.

4. He was also indebted to the plaintiff Bank. On, the, 1st August 1913, A. H. Guzuavi executed a mortgage to the plaintiff Bank to secure the floating balance" This mortgage was with respect to the same properties as were covered by the mortgage held by the Allahabad Bank and was subject thereto.

5. On the 13th September 1913, the defend-ants, A, K. Guznayi (a brother of the mortgagor) and Mr. S.R. Das, executed a promissory note payable on demand in favour of the plaintiff Bank for Rs. 2,55,000 with interest thereon as security for A. H. Guznavi's indebtedness. On the 23rd September 1913, the plaintiff Bank, by a deed executed on that day wherein it was recited that the transferees had,

at the request of the mortgagor, agreed to give to the Bank their joint and several promissory note for the amount secured by the within written Indenture, transferred the debt due to the plaintiffs, from A. H. Guznavi and the mortgaged properties to the defendants A. EL Guznavi and S.R. Das.

6. On the 24th September 1913, the defendants, A, K. Guznavi and S.R. Das, deposited with the plaintiff Bank the title deeds, viz., the mortgage of the 1st August 1913 and the transfer deed of 23rd September 1913, with the plaintiff Bank, and executed a declaration of mortgage to the effect that the said Indentures had been deposited to secure the payment by the said defendants of the sum of Rs. 2,55,000 secured by the said promissory note and interest, and undertook to execute a legal or formal sub-mortgage of the premises comprised in the Indentures.

7. On the 12th November 1914, the plaintiffs sued A. K. Gnznavi, S.R. Das and A. H. Guznavi. By paragraph 5 of the plaint, the plaintiffs submitted that they were entitled to a decree against, the 1st and 2nd defendants for the sums secured under promissory note of 13th September 1913, and they claimed further to be entitled to a mortgage decree in respect of the properties mentioned and contained in the Indentures of 1st of August 1913 and the 23rd September 1913.

8. In this suit a preliminary mortgage decree was made on the 8th of February 1915, and no personal decree in respect of the promissory note was made.

9. It was stated, during the course of the argument, that no personal decree in respect of the" promissory note was asked for at the hearing.

10. On the 21st July 1915, A. H. Guznavi was adjudicated an insolvent.

11. In pursuance of the mortgage decree of 8th February 1915, the Registrar took an account of what was due to the plaintiff Bank for principal and interest on the promissory note and, on the 23rd July 1915, he reported that on the 11th February 1916 there would be due to the plaintiff Bank, upon and by virtue of the promissory note in the said decree mentioned, the sum of Rs. 2,73,026-10-10 for principal and interest to the said 11th February 1916, and appointed the 12th February 1916 as the time for the defendants to pay the said sum of Rs. 2,73,026 10 and costs and interest.

12. Nothing was paid in respect of that decree on the date above mentioned or at any time.

13. In October 1915 an application was made by the Allahabad Bank to the Judge exercising Insolvency Jurisdiction, on notice to the plaintiffs, A. H. Guznavi, A. K. Guznavi and S.R. Das, and Greaves, J., made an order under the Presidency Towns Insolvency Act, 1909, that the properties included in the mortgage of the Allahabad Bank should be sold by the Official Assignee free from all incumbrances, and that the balance of the sale-proceeds, after payment of the costs of the sale and the claim of the Allahabad Bank, should be retained by

the Official Assignee and be paid by him in discharge of other incumbrances in accordance with their respective priorities. On the hearing of this application, the defendant S.R. Das appeared and opposed the application, but the plaintiffs, though they had been requested by the attorneys of the defendant S.R. Das to oppose the application, did not do so.

14. In spite of the opposition of the defendant S.R. Das the Court made the order aforesaid. This order" was not drawn up until 4th January 1916.

15. Nothing having been paid on the appointed day, viz., the 12th February 1916, by the defendants, on the 28th February 1916 a final decree in this suit was made, whereby it was ordered that the premises charged under the mortgage in the decree "of the 8th February 1915 mentioned, or a sufficient part thereof, should be sold subject to a prior mortgage in favour of the Allahabad Bank in the said decree mentioned. The drawing up of this order was directed to be postponed for three months, and we were informed during the argument that the plaintiffs protested against the postponement. On the 9th January 1917, the sale, directed by the order of the 4th January 1916 of the Insolvency Court, was carried out by the Official Assignee: the property realised about Rs. 60,000 only, which was not enough to meet the amount due to the Allahabad Bank upon the first mortgager such amount, we were informed, was over five lakhs of rupees.

16. An application was, thereupon, made by the plaintiffs to Chitty, J., for a personal decree against the defendants, A. K. Guznavi and S.R. Das, for Rs. 2,88,862-3-3 and costs due under the decrees of the 8th February 1915 and 28th February 1916] and under an order in the suit dated 11th February 1915 and interest. On the 30th January 1917, Chitty, J., dismissed this application on the ground that the conditions precedent contained in the decree of the 8th February 1915 had not been fulfilled, i.e., that the mortgaged property had not been sold in pursuance of the mortgage decree.

17. On the 26th June 1917, this Court, on appeal, upheld Chitty, J.'s judgment.

18. On the 21st April 1917, pursuant to the decrees of the 8th February 1915 and the 28th February 1916, the Registrar put up for sale the equity of redemption in the following properties:

Lot A.--All that unexpired term of a verbal tenancy for six years from November 1911 of No. 7, Bowbazar Street, Calcutta (possession of which has already been surrendered), together with any rights still subsisting in the stock-in-trade (already sold by a prior mortgagee) and out-standings due to the defendant, A! H. Guznavi, in his business of the United Bengal Company.

Lot B.--All the claims of the defendant, A. H. Gusnavi, against Messrs. Berg Sons & Co., Ltd., and Messrs. Donald Campbell & Co., respectively (which the said A. H. Guznavi says are non-existent),

Lot C.--All that the interest (if any) of the defendant A. H. Guznavi in the Zamindaria in the Districts of Mymensingh and Pabna (which interest was on the

9th January 1917 sold free from incum-brances by the Official Assignee of Calcutta as Assignee of A. H. Guznavi, an insolvent under an order of this Court, dated the 4th January 1916).

19. At the sale one G. N. Kapur purchased the above-mentioned lots at the total of Rs. 20--Rs. 10 for lot A, Rs. 5 for lot B and Rs. 5 for lot C.

20. It appears that Chaudhuri, J., issued a Rule on the 5th March 1917 for a review of the decree of the 8th February 1915, but on the hearing he dismissed the application for review.

21. On the 14th May 1917, an application was made by the plaintiff Bank to Chaudhuri, J., for a personal decree against the defendants, A. K. Guznavi and S.R. Das, for Rs. 2,93,893-0-11 and costs due to the plaintiffs under the decrees of 8th February 1915 and the 28th February 1916 and the order of 11th February 1915 and interest, and! on the 12th July 1917, Chaudhuri, J., held that plaintiffs had fulfilled the requirements of the CPC and were entitled to a personal decree against the 1st and 2nd defendants for the said sum less the sum realised by the sale, if that sum had not already been taken into account, and a decree was made accordingly.

22. From this judgment the defendants, A. K. Guznavi and S.R. Das, have appealed.

23. The appeal which was argued was that of the defendant, S.R. Das, and it was agreed by learned Counsel that the appeal of the defendant, A. K. Guznavi, would, as a matter of course, follow the event of this appeal.

24. The decrees of the 8th February 1915 and of the 28th February 1916 were made in pursuance of the provisions of Order XXXIV, Rules 4(1) and 5 (2), and the application for a personal decree against the two defendants was in pursuance of Order XXXIV, Rule 6.

25. It was contended by the learned Advocate-General on behalf of the defendant, S.R. Das, that in view of the provisions of the above-mentioned rules and in view of the terms of the said decrees, the Court had no jurisdiction to make a decree for personal liability of this defendant until all the properties included in the decree had been sold in pursuance thereof: that the words "or a sufficient part thereof" in Order XXXIV, Rule 5 (2), which are also to be found in both the said decrees, showed that not less than the whole of the properties mentioned in the decrees must be sold in order to comply with the provisions of the rules and with the terms of the decrees, that the question of sufficiency could not arise unless it was intended the whole should be sold if necessary to liquidate the amount secured by the mortgage, that as regards the lots mentioned in the Notification of Sale of the 21st April 1917, lot C comprised the interest (if any) of A. H. Guznavi in the Zemindaris, that these Zemindaris had been sold by the Official Assignee of A. H. Guznavi, an insolvent, pursuant to the order of Greaves, J., of the 4th January 1916, free from all incumbrances: that although it

might be that such order was a wrong order, it was made by a Court of competent jurisdiction and that no appeal had been made against it, though the plaintiffs could have appealed, if they had so desired : that, consequently, the order for sale by the Official Assignee must be considered as a valid order, and the sale must be held a valid sale : that the properties having been sold free from incumbrances, the result of the sale was that the whole interest in the Zemindaris went to the purchaser and that thereafter the right of the plaintiffs was confined to the balance of the sale-proceeds, if there were any, after the first mortgagee's claim had been satisfied: that, consequently, as regards lot 0, there was nothing which could be sold on the 21st April 1917, and therefore that, as the whole of the properties mentioned in the decrees had not been sold in pursuance of such decrees, the defendant could not be made liable personally.

26. It cannot be said that the sale of the 21st April 1917 was altogether nugatory: for there were included in the lots, two items which had not been sold by the Official Assignee, viz., (i) " outstandings due to the defendant, A. H. Guznavi, in his business of the United Bengal Company" mentioned in lot A, and (ii) lot B, " all the claims of the defendant, A. H. Guznavi, against Berg Sons & Co., Ltd., and Messrs. Donald Campbell & Co., respectively, which the said A. H. Guznavi says are nonexistent."

27. These two items were specifically mentioned in the mortgage of the 1st August 1913, which was one of the deeds referred to in the memorandum of deposit, dated the 24th September 1913, made by defendants, A. K. Guznavi and S.R. Das.

28. In this mortgage it was recited that the mortgagor was entitled to a sum of about ? 6,438-1-7 then owing by Mesars. Berg Sons & Co., Ltd., and also to a sum amounting to ? 4,870-7-8 then owing by Messrs. Donald Campbell & Co.

29. Although these two items at the time of the sale were apparently of very little value, they were included in the mortgage, they were included by the Registrar in the" Notification of Sale, they had not been sold prior to the 21st April 1917, and they were sold at the sale of that date by the Registrar in pursuance of the decrees of the 8th February 1915 and the 28th February 1916.

30. Further, the interest, if any, of A. H. Guznavi in the Zemindaris was sold at the same sale.

31. As regards this last item and also as regards the unexpired term, which had been surrendered, and the stock-in trade at 7, Bowbazar Street, which had already been sold by a prior mortgagee, I think it must be taken that there was nothing in fact to sell.

32. Mr. Buckland, however, for the Bank contended that this would not affect the Bank's right to a personal decree for the sale purported to be a sale of all the mortgaged property, and for the purposes of this case if made no matter whether the Bank had any title to the property purported to be sold and that

consequently the decree of the 8th February 1915 and the 28th February 1913 had been carried out.

33. This argument I do not adopt. I do not think it would be right to hold that the decrees had been carried out by means of what purported to be a sale by the Registrar, if the properties offered did not in fact exist at the time of the sale although they had been included in the mortgage. But this does not dispose of the case, for the plaintiffs urged that the decrees had been complied with inasmuch as the Registrar sold in pursuance of the decrees all the properties covered by the mortgage which were in existence and available for sale at the time of the sale of the 21st of April 1917, and that more than this could not be done.

34. If it could be shown that the properties which were included in the mortgage, and which could be sold in pursuance of the decrees, were in fact not sold owing to some action or default of the plaintiffs so as to impose on the mortgagors a personal liability to which otherwise they would not have been liable, then I think the plaintiffs would be debarred from obtaining the decree for personal liability which they claim: see *Ram Ranjan Chakravarti v. Indra Narain Dass* 33 C. 890 : 10 C.W.N. 862. There are two grounds relied upon by the defendant in this respect.

35. First, it was argued that the plaintiffs should have appeared at the hearing of the application before Greaves, J., and that the plaintiffs should have joined the defendant, S.R. Das, in opposing the making of the order for sale by the Official Assignee free from incumbrances.

36. Reliance was placed on the fact that the plaintiffs received not only a notice of the application but also a request from the Attorneys of this defendant to oppose the application and, consequently, it was urged that the plaintiffs were to some extent responsible for the fact that the equity of redemption in the Zemindaris could not be sold in pursuance of the decrees.

37. I do not think this is sufficient to debar the plaintiffs' claim. The defendant, S.R. Das, was one of the second mortgagees who had made a sub-mortgage by the deposit of the deeds with the Bank. This defendant appeared by Counsel and opposed the application, and no doubt all that could be urged against the application was urged, and I do not think we ought to assume that if the Bank, who would have been claiming under the defendant, S.R. Das, had opposed the application, such opposition would have made any difference.

38. It is true that if the plaintiffs' advisers had been aware of the point which has now been taken (a point which, as far as this case is concerned, is purely a technical one), they might have urged it before the Judge and argued that a sale by the Official Assignee might prevent the decrees of the 8th February 1915 and 28th February 1916 being carried out so that the plaintiffs' remedy against these defendants personally might be endangered, but I think it is fairly obvious that such a possibility never entered into the consideration either of the plaintiffs or

these two defendants at the time, and that they were relying upon the sale of the Zemindari properties producing a sum sufficient to meet the claims of both the Banks.

39. Secondly, it was urged that although, the order of the 28th February 1916 was postponed for 3 months, the sale by the Official Assignee did not take place until the 9th January 1917, and the plaintiffs might have applied to have the decree of the 28th February 1916 carried out before that time.

40. We have no information as to what was the cause of this delay and we are not at liberty to speculate.

41. The fact is patent, however, that considerable delay took place in carrying out both the mortgage decree of 28th February 1916 and the decree of the Insolvency Court of 4th January 1916. The sale by the Official Assignee did not take place until 9th January 1917.

42. The properties are apparently of considerable size, the preparation for the sale thereof would take some "considerable time and they were thought to be of much greater value than the amount eventually realised; indeed, I think it was admitted during the argument that both the plaintiffs and these two defendants were hoping that the sale would realise enough to meet the claims of the two Banks and thus relieve these two defendants of all personal liability. Unfortunately this expected contingently did not happen", but I do not think that the plaintiffs, by reason of the delay, under the circumstances can be said to have been responsible for the fact that the equity of redemption was not available for sale by the Registrar under the mortgage decrees on the 21st April 1917. There remain?, therefore, the point urged by the learned Advocate-General, viz. that inasmuch as all the properties included in the decrees were not sold in pursuance thereof, the plaintiffs are debarred from obtaining a personal decree against these defendants. The decrees do not mention the properties specifically, but the properties are described therein by reference to the mortgage of 1st August 1913 and the Indenture of 23rd September 1913.

43. The plaintiffs' security was a memorandum of deposit by the second mortgagees: and their security was, therefore, subject to the Allahabad Bank's first mortgage and subject to the rights of that Bank incidental to the first mortgage.

44. It was in pursuance of such rights that the Allahabad Bank obtained the order for the sale of the Zamindari properties free from incumbrances, and that, consequently, these properties were not available for sale on the 21st April 1917 in pursuance of mortgage decrees obtained by the plaintiffs.

45. The question, therefore, is whether the fact, that some of the properties included in the above-mentioned Indentures, and therefore included in the mortgage decrees, have since the date of the decrees and by reason of the prosecution of their rights by the first mortgagees and through no act or default

of the plaintiffs become not available for sale, is sufficient to debar the plaintiffs' claim for a personal decree.

46. In my judgment, we should be putting too narrow and rigid a construction upon the provisions contained in the rules and upon the terms of the decrees if we were so to hold. The object of the rules obviously is that the remedy of the mortgagee should" in the first instance be against the property mortgaged, and that such property should be exhausted before a personal liability is imposed upon the mortgagor. But the rules surely cannot mean that if a portion of the property, however small, which was included in the mortgage and therefore included in the mortgage decree as a portion of that which was to be sold, is destroyed or ceases to be available for sale after the date of the decree and through no fault of the mortgagee, then there can be no decree for personal liability against the mortgagor.

47. Yet this is what is involved in the argument of the learned Advocate-General.

48. It was not denied that if the provisions of Order XXXIV, Rule 5, and the directions of the decrees as regards the sale of the properties have been complied with, the plaintiffs would be entitled to a personal decree under Order XXXIV, Rule 6.

49. Having regard, therefore, to the fact that all the properties covered by the mortgage, which were in existence and which were available for sale at the date of the sale, were sold on the 21st April 1917, and assuming, as I have held, that the plaintiffs were not responsible for the fact that some of the properties included in the mortgage were not in reality available for sale, though the sale purported to include them, I think it should be taken that the provisions contained in the rules and the directions contained in the mortgage decrees as to the sale have been complied with and that the plaintiffs are entitled to the personal decree which the learned Judge has directed. It was argued that this case was covered by our previous decision upon the appeal from Chitty, J, I do not think that is so: at that time no sale had taken place in pursuance of the mortgage decrees, whereas a material fact on this appeal is that a bona fide sale has been held whereby all the properties covered by the mortgage, which were available for sale, have been sold in pursuance of the decrees.

50. Some cases were cited before us, and much reliance was placed by the learned Advocate General upon *Badri Das v. Inayat Khan* 22 A. 404 : A.W.N. (1900) 132 : 9 Ind. Dec. (N.S.) 1305 and the case already referred to [*Ram Ranjan Chakravarti v. Indra Narain Dass* 33 C. 890 : 10 C.W.N. 862].

51. The learned Judges in the Allahabad case apparently held on the facts of the case that either the previous sale of the Zamindari properties which had taken place was due to the fault of the appellant, or, if it was not, the appellant had still a right of redemption which had not been sold, and consequently that the whole of the mortgaged property had not been brought to sale.

52. As regards the case of Ram Ranjan Chakravarti v. Indra Narain Dass 33 C. 890 : 10 C.W.N. 862, the ratio decidendi was that as the mortgagees had released substantial portions of the property originally mortgaged and the purchasers of these portions from the mortgage debt, and without the consent of the mortgagors, it was held that the mortgagees could not release a portion of the mortgaged property to the detriment of the mortgagor, so as to impose on him a personal liability, to which otherwise he would not be subject. I do not think that either of these oases covers the present case, and it is not necessary, therefore, for me to say whether I agree with the decision in the Allahabad case. In any event it is not binding on this Court.

53. It is to be noted that on the facts of this case the point which has been relied upon by the appellant is merely a technical one; for, if the course, which the learned Advocate-General argued should have been taken, had in fact been followed, and if all the properties included in the plaintiffs' mortgage had been sold in accordance with the decrees, such properties would have been sold subject to the first mortgage of the Allahabad Bank: the debt due to that Bank was over five lakhs of rupees: the properties when sold by the Official Assignee produced Rs. 60,000: it was said that if the property had been sold by the Court instead of by the Official Assignee, it might have fetched more, having regard to the high reputation obtaining for sales by the Court. But making all due allowance in that respect, the difference between the price fetched by the property and the debt due to the Allahabad Bank is so large that it is obvious that even if the property had been sold by the Court, the first mortgage would not have been satisfied- and there would have been nothing left for the plaintiffs.

54. Consequently, if that course had been followed, the two appellant defendants would have been in no better position. In fact they would have been worse off: they would not have obtained credit for even the Rs. 20, the result of the sale of the 21st April 1917, which has been directed to be deducted from the plaintiffs' claim.

55. For the above-mentioned reasons, in my judgment, this appeal should be dismissed with costs.

Woodroffe, J.

56. It may be that if the whole of the mortgaged properties had been sold by the Official Assignee, there could not have been another sale under the mortgage decree. But that is not the case here. What was sold by the Official Assignee were Zemindar in Mymensingh and Pabna. The Official Assignee did not sell two other properties, viz., (a) outstandings due to A. H. Guznavi in his business of the United Bengal Company. The paper-book on this point has been misprinted, (6) the claims of the said defendant against Messrs. Berg Sons, Ltd., and Messrs. Donald Campbell & Co. It is said "that nothing is due on any of these accounts. This may be the statement of A. H. Guznavi, but it does not prevent this apparent interest of his" being sold. If it be the fact that a mortgagor

represented that there was money due to him and mortgaged it, the mortgagee, cannot be prejudiced in his personal remedies if such statement were in fact untrue. If it were so, a man might fraudulently represent that he was the owner of property and mortgage it and thus prevent the carrying out of a mortgage decree on the ground that there was no property to sell.

57. But it is next argued that even if properties (a) and (b) were not sold and could be sold under the mortgage decree, that would not entitle the mortgagee to a decree for the balance. It is argued that the property which must be sold before such balance is ascertained must be the whole property but that though properties (a) and (b) had not been sold, yet the Zemindaris had been sold and, therefore, the whole of the mortgaged property could not be sold so as to found an application for a personal decree for the balance. The Zemindari property was in fact put up for sale. Even if it be assumed that these properties could not be re-sold, then all the property which could be sold was in fact sold and fetched Rs. 20, which indicates that it is worth something. The argument of the appellant is of a highly technical character. I am not prepared to hold that the present case is without the scope of the order. No doubt the argument may be with strictness maintained that a personal decree cannot be obtained in any case where the whole of the property directed to be sold has not been sold for whatsoever cause may be, But such a rigid interpretation of the section would lead to manifest absurdity and injustice. Thus, as was put in the argument, if, after a decree directing" the sale of land and a house, the latter should be burnt so that it could not be sold, in such a case on the argument of the appellant no personal decree could be got because, as a foundation for it, the whole mortgaged property, namely, land and house directed to be sold, could not be sold. We must-look at this matter rationally and with reference to the reason of the rule, namely, that the personal liability will only be enforced where there is a deficiency after the sale of all the mortgaged property available for sale at the date of sale. In other words, the personal liability must not be improperly increased. I cannot say that the conclusion at which the learned Judge has arrived is erroneous, and I agree that the appeal should be dismissed with costs.