

(1947) 04 CAL CK 0009
In the Calcutta High Court
Case No : Civil Revision Case No. 694 of 1946

Shiv Kumar Prosad

APPELLANT

Vs

The Trustees For The Improvement of Calcutta and Others

RESPONDENT

Date of Decision : 21-04-1947

Acts Referred:

Citation : (1947) 04 CAL CK 0009

Judgement

Chakravartti, J.—The claim put forward by the Petitioner in a mortgage suit wherein he is a Defendant raised several questions, but we are called up to decide only one of them, namely, whether he is liable to pay court-fees on his claim. The learned Judge below has held that he is. It is not necessary to state the facts of the case save in the barest outline. Suffice it to say that in the year 1928, Opposite Party No. 1, the Calcutta Improvement Trust, sold a piece of land to two persons named Sital Saha and Lomar Saha for a sum of Rs. 20,000 and accepted a mortgage of that very property as a security for half the consideration money which was not paid at the time. By 1933, Lomar Saha was dead and the land was partitioned between his son, who is Opposite Party No. 4 in this Rule, and Sital Saha, the northern half being allotted to Opposite Party No. 4 and the southern half to Sital. It is alleged that previously, on two different dates in 1927, Opposite Parties Nos. 4, 5, 14 and the predecessor-in-interest of Opposite Parties Nos. 6 to 10 borrowed from the Petitioner two several sums of Rs. 10,000 and Rs. 5,000. In 1933, they borrowed a further sum of Rs. 4,000 and executed a mortgage of the northern half of the land for a consolidated debt of Rs. 20,000, this having been done on the basis that they were co-parceners of a Mitakshara joint family formerly represented by Lomar Saha and as such interested in his share of the property. The suit to which this Rule relates was brought by the Calcutta Improvement Trust to enforce their mortgage on the entire land and in that suit, the Petitioner was impleaded as Defendant No. 10 in the status of a puisne mortgagee of the northern half. He filed a written statement by which he put forward his own mortgage and claimed to be entitled to recover a sum of Rs. 32,052-10. His further case was that Opposite Party No. 1 was entitled to get

only half of its dues out of the sale proceeds of the northern half of the land and that his own dues ought to be paid out of the surplus left of those proceeds after paying half of the Plaintiff's dues.

2. The Petitioner's claim was disputed by the other Defendants, some of whom said that his dues had been paid off, while others said that the mortgage itself was a sham transaction. It is thus clear that if the Petitioner's claim is to be gone into in the present suit, the Court will have to adjudicate fully on the rights and liabilities of the parties just as it would have to if the Petitioner brought a mortgage suit on his own mortgage.

3. The question to be decided in the present Rule is whether the Petitioner is liable to pay court-fees on his written statement, it arose when the Petitioner invited the Court to frame a specific issue relating to his mortgage and when this prayer was opposed by the Plaintiff and Defendant No. 9 who is Opposite Party No. 18 in the present Rule. By his order dated the 28th March, 1946, the learned Judge overruled the objection that, on the facts, the present case did not come under Or. 34, r. 4 (4) of the CPC and the Petitioner's claim would not be gone into in the present suit at all, but he held that the claim could not be entertained unless the Petitioner paid the requisite court-fees. He directed the Petitioner to pay a sum of Rs. 1,590 within a certain time and added that in default of payment, the Court would refuse to consider his claim. It was against this order that the present Rule Was obtained.

4. Neither the Plaintiff, nor any of the other Defendants has moved this Court against that part of the learned Judge's order by which he held that the Petitioner's claim could be and indeed had to be, gone into in the present suit, provided he paid the requisite court-fees. We are, therefore, relieved of the task of considering the somewhat difficult question as to the proper scope of Or. 34, r. 4 (4), C.P.C. and in considering the question of court-fees, we must proceed on the basis that in present case was one in which the sub-rule did apply to the Petitioner's claim. We may point out that in Or. 34, r. 4, as now amended by the Calcutta High Court, sub-r. (4) has become sub-r. (5), although the text of the sub-rule has remained unaltered. The question we have to consider is when a puisne mortgagee is impleaded in a prior mortgagee's suit and there is no question that Or. 34, r. 4 (5), C.P.C., applies, must the puisne mortgagee, in order to have his claim entertained, pay court-fees thereon?

5. The learned Judge appears to think that although Or. 34, r. 4 (5) is mandatory and requires the Court to adjudicate on the rights and liabilities under the puisne mortgage in all cases where it applies, still there can be an adjudication without payment of court-fees only, when there is an admitted mortgage and an admitted liability, but where disputed questions have to be determined, court-fees must be paid, if there is to be an adjudication. In coming to this conclusion he claims to have found "guidance " in a decision of this Court in the case of *Akhilbandhu Guha v. Sm. Suradhani Debya Choudhurani* (1936) 65 C.L.J. 1. The learned Judge holds further that in such a case the written statement should be

treated as a plaint and he ultimately takes what he calls "a broad view," namely, that there is no reason why a puisne mortgagee should not pay court-fees, if he wants to have a contested claim considered and determined by the Court.

6. With regard to the decision in the case of Akhilbandhu Guha v. Sm. Suradhani Debya Choudhurani (1936) 65 C.L.J. 1, we may say at once that in purporting to be guided by that decision, the learned Judge only misguided himself. In fact, the Court in that case said nothing as regards the payment of the court-fees beyond mentioning the contention of Defendant No. 1 that court-fees ought to have been paid by Defendants Nos. 3 to 6. In relation to the Plaintiff's mortgage, those Defendants were prior mortgagees with respect to some properties and puisne mortgagees with respect to others. The learned Judge quotes an observation for the judgment which is to the following effect:

But all the time the defence which was considered by the trial Court was confined to the question with regard to the Plaintiff's mortgage in suit; it was not considered with regard to mortgages in favour of Defendants Nos. 3 to 6.

7. He also refers to a passage quoted by the learned Judges from the judgment of the trial Court which reads thus:

No objection has been raised as to the corrections of the accounts furnished by the mortgagees.

8. These two passages, he thinks, indicate that what weighed with the learned Judges in "turning down" the objection as to court-fees was that there had been no contest over the mortgages put forward by Defendants Nos. 3 to 6 and he adds that if the law had been that the puisne mortgagee was not liable to pay court-fees in any circumstances, the objection could have been turned down "without so much discussion as referred to."

9. It is only too clear that the learned Judge has completely misread the judgment. The discussion referred to by him relates not to the subsequent mortgage of Defendants Nos. 3 to 6, but to their prior mortgage; and it relates to a contention advanced by Defendants Nos. 3 to 6 that with respect to that mortgage they should have been given a decree in Form No. 10, that is to say, a decree for redemption. The answer of Defendant No. 1 was that Defendants Nos. 3 to 6 should have paid court-fees and that, in any event, his defence with respect to the prior mortgage had been shut out by the trial Court. It was with reference to this latter complaint that the observations relied upon by the learned Judge were made and it appears to be perfectly clear from the judgment that the Court rejected the contention of Defendants Nos. 3 to 6 that they ought to have got a decree in Form No. 10 on the ground that there had been no consideration of the defence of Defendant No. 1 against the prior mortgage and that no defence had even been allowed to be taken. Nothing was said with respect to court-fees and the contention of Defendant No. 1 was not even "turned down," as the learned Judge imagines. It was simply not considered. We may add that even if the observations had reference to the question of court-fees

the conclusion drawn by the learned Judge would not follow, because to say that there could be no question of paying court-fees when there had been no co-test and no adjudication is not equal to saying that if there had been contest and adjudication, court-fees would have to be paid.

10. Coming now to the question itself, it would be convenient to set out first the terms of Or. 34, r. 4 (5). That rule, so far as is material, provides that

Where in a suit for sale subsequent mortgagees or persons deriving title from, or subrogated to the rights of, any such mortgagee, are joined as parties, the preliminary decree referred to in sub-rule (1) shall provide for the adjudication of the respective rights and liabilities of the parties to the suit in the manner and form set forth in Form No. 9, Form No. 10 or Form No. 11 as the case may be, of Appendix D, with such variations as the circumstances of the case may require.

11. We are not concerned in the present case to determine the true scope of this rule. We need only point out that the direction contained in the sub-rule is mandatory and makes it the duty of the Court to adjudicate on the rights of puisne mortgagees impleaded in a prior mortgagee's suit. It need hardly be added that a puisne mortgagee will be impleaded as a Defendant and, as a matter of course, he will furnish particulars of this mortgage in his written statement. On what authority can he be required to pay court-fees on this written statement when the law enjoins that if he is impleaded as a party, his rights must be considered and determined?

12. Before us, the Rule was opposed by the Plaintiff and Opposite Party No. 18 as also by the Crown. It was conceded on behalf of the Crown that if the puisne mortgagee merely stated his claim, court-fees would not have to be paid, but it was contended that if he went further and asked for certain specific reliefs, he would be bound to pay court-fees. We are entirely unable to appreciate this distinction. The reliefs which can properly be granted under Or. 34, r. 4 (5) are mentioned in that sub-rule and the relevant Forms and the decree must provide for those reliefs, whether the puisne mortgagee makes a specific prayer or does not. We are unable to understand how the making of specific prayers creates a liability to pay court-fees. If the puisne mortgagee makes prayers which do not come properly within Or. 34, r. 4 (5), the Court will simply disregard them but no liability to pay court-fees can arise out of the circumstance that such prayers are made. We might add that in the present case no prayers of any kind were made in the written statement.

13. On behalf of the Plaintiff and Opposite Party No. 18, the Rule was opposed mainly on the analogy of written statements pleading a set-off or containing a counter-claim, but towards the close of the argument, Mr. Sen, who appeared for Opposite Party No. 18, very fairly drew our attention to a decision of the Nagpur High Court in the case of Ganpatrao v. Shamrao ILR [1941] Nag. 194, where the exact question was decided against the Revenue. The learned Judges held that since the document by which the puisne mortgagee set up his mortgage was a

written statement and since it was not a written statement containing a plea of set-off or a counter-claim, no court-fee was payable on it under any provision of the Court Fees Act.

14. In our opinion, the view taken by the Nagpur High Court is correct. It is elementary that a liability to pay court-fees cannot be inferential, but must be shown to be imposed by some "charging provision. The Court Fees Act, by sec. 19 (iii), expressly provides that written statements are not chargeable with any fee. It is true that the express exemption relates only to "written statements called for by the Court after the first hearing of the suit," but it is well established that since there is no provision elsewhere in the Act generally charging written statements with court-fees, all written statements are exempted. The only exception is in the case of written statements pleading a set-off or a counterclaim, but in that case the liability is expressly provided for by Article I, Schedule I, as amended by sec. 155 and Schedule IV of the Civil Procedure Code, 1908. The liability cannot possibly be extended by analogy and, in our opinion, the contention of the contesting Opposite Parties is sufficiently disposed of by the absence of any provision in the Court Fees Act under which a written statement of the present character could be said to be chargeable with a fee. It cannot in our opinion be said that a subsequent mortgage, set up by a puisne mortgagee, is a "counter-claim" within the meaning of Article 1, Schedule I, for nothing is claimed against the Plaintiff and whatever is claimed against the mortgagor, is claimed in subordination to the Plaintiff's rights.

15. As regards the distinction made by the learned Judge, it is sufficient to point out that Or. 34, r. 4 (5) makes no distinction of any kind between contested and uncontested claims and does not provide that in the former case the decree shall provide for the adjudication of the rights of the puisne mortgagee "subject to payment of court-fees by him." The latter words, which are not in the sub-rule, cannot be imported there. Nor is a liability to pay court-fees established by calling the written statement a plaint. In suits for partition, for example, everyone of the co-sharer Defendants is in the position of a Plaintiff and everyone of them makes a prayer for a separate allotment by his written statement; but no one has ever said that such written statements are chargeable with court-fees. The position of the revenue is weaker in the present case where the Court adjudicates on the rights of a puisne mortgagee not because it is asked to do so by his written statement, but because the law enjoins that it must be done.

16. Indeed, if one considers the position of a puisne mortgagee, impleaded in a prior mortgagee's suit, it will appear that his freedom from paying court-fees on his written statement is not so unreasonable as the learned Judge appears to think. It is true that he gets a free adjudication of his rights; but the only practical relief which the decree gives him is that he is declared entitled to obtain satisfaction of his dues out of the surplus sale proceeds, if any be left after satisfying the Plaintiff's dues (see Form No. 9). The puisne mortgagee cannot

apply for a final decree unless he himself pays off the prior mortgagee; and the right to apply for a sale arises only if the Plaintiff's dues are not paid, but not if the puisne mortgagee's dues are not. It may again be that nothing will be left of the sale proceeds after paying off the prior mortgagee's dues and the puisne mortgagee, knowing the value of the property, might not have troubled to bring a suit on his mortgage at all, if he was left to himself. When he is impleaded as a Defendant in a prior mortgagee's suit, he is brought before the Court whether he wishes to come or not and his rights are adjudicated on by the Court under the compulsion of Or. 34, r. 4 (5). There seems to be no reason in the circumstances why a Defendant puisne mortgagee should be required to pay court-fees in such a case, when it is not he who sets the Court his motion, when he cannot prevent the Court from adjudicating on his rights and when benefit which the decree gives him may in the end prove to be a barren benefit. The learned Advocate for the Crown referred to the decision of the Madras High Court in the case of *Vedabvasa Ayyar v. The Madura Hindu Labha Nidhi Co., Ltd.* ILR (1918) Mad. 90, as establishing that the puisne mortgagee would have a right to apply for a sale, if the prior mortgagee did not. That decision is one under the old provisions of the Transfer of Property Act and the judgment points out quite clearly that the decree actually passed in that case did not authorise the puisne mortgagee to apply for sale, in default of payment of his own dues. There is only an observation in the nature of an obiter dictum to the effect that the utmost that could be said was that if the first mortgagee, for some reason or other, did not apply for sale in spite of the fact that he had not been paid, the second mortgagee could apply for sale in order to work out the right to share in the surplus, if any. This sup-posed right is not warranted by the Civil Procedure Code, as it now stands; nor does it appear to us to have been warranted by the old provisions of the Transfer of Property Act. In any event, the right is only a right to bring the properties to sale in order to work out the right to share the sale proceeds. The puisne mortgagee cannot apply for sale if the prior mortgagee is paid off and in that event he has to bring a separate suit on his mortgage, if he wants to enforce his rights. In other words, even he pays court-fee now, he will have to pay it again. The right referred to by the Madras High Court is merely a right to bring about a sale in order to work out the rights of the respective parties in the sale proceeds. It does not carry the matter further and does not establish any benefit resulting to the puisne mortgagee more than the problematic benefit of finding something left over.

17. Reference was also made in the course of the argument to a decision of this High Court in the case of *L.J. Mackintosh v. N.S. Watkins* (1904) 1 C.L.J. 31. That also was a decision under the old provisions of the Transfer of Property Act and it was observed by Brett, J., Mookerjee, J., concurring, that the decree could not be framed in such a way as to include the amount due to the second mortgagee and that such a decree, if passed, would be contrary to the provisions of Chapter III of the Court Fees Act under which such relief could be given to a mortgagee only in a suit on which the institution fee provided by law had been paid. Since then,

however, the law has been changed and it is now expressly directed that the decree must include the sum found due to the second mortgagee, but no provision has been made for the payment of court-fees by the second mortgagee. The Legislature must have been aware that the second mortgagee was now getting a decree otherwise than in a suit on which the institution fee had been paid and if yet it made no provision for the payment of court-fees, we cannot see on what authority court-fees can be demanded.

18. For the reasons given above we hold that the Petitioner is not liable to pay court-fees on his written statement. The Rule is accordingly made absolute and that part of the learned Judge's order by which it has been held that the Petitioner is liable to pay court-fees, is set aside. The question as to court-fees was raised by the Plaintiff and Opposite Party No. 18 who are private parties. As was pointed out by the Privy Council in the case of *Rachappa Subrao Jadhav v. Shidappa Venkatrao Jadhav* L.R. 46 IndAp 24 at p.32: (1948) 24 C.W.N. 33

the Court Fees Act was passed not to arm a litigant with a weapon of technicality against his opponent but to secure revenue for the benefit of the State.

The Petitioner is accordingly entitled to get from the contesting Opposite Parties, namely, Opposite Party No. 1 and Opposite Party No. 18, his costs of this Rule which we assess at six gold mohurs, three gold mohurs to be paid by each of the said Opposite Parties.

Ellis, J.

I agree.