

(1944) 07 CAL CK 0003
In the Calcutta High Court

Sudhamoyee Singha and Others

APPELLANT

Vs

Jessore Loan Company Ltd. and Others

RESPONDENT

Date of Decision : 07-07-1944

Acts Referred:

Transfer of Property Act, 1882 — Section 52

Citation : AIR 1945 Cal 322

Hon'ble Judges : B.K. Mukherjea, J;Akram, J

Bench : Full Bench

Judgement

B.K. Mukherjea, J.—The facts giving rise to these two appeals which arise out of two analogous suits, and involve the same points for decision may be shortly stated as follows: One Harendra Krishna Ghose Choudhury who owned, amongst others, a three anna 4 ganda share in Touzis Nos. 962 to 966 of the Khulna Collectorate died in the year 1893 leaving behind him as his sole heir, a childless widow, named Brojobhamini. Shortly after the death of Harendra, Brojobhamini presented an application for letters of administration to the estate of her deceased husband in the Court of the District Judge at Jessore and the application was registered as letters of administration Case No. 89 of 1893. A caveat was entered in these proceedings by two of the reversioners, namely, Debnarayan and Joyram and they put in a separate application for obtaining letters of administration on their own behalf to the estate of the deceased. Eventually, the parties came to a settlement and a petition of compromise was filed on 15th January 1894 according to which the caveators withdrew their objection to the grant of letters to the widow and the widow in her turn agreed to pay, so long as she lived a sum of Rs. 400 annually as allowance to the reversioners for the time being. This agreement was given effect to and Brojobhamini continued to pay Rs. 400 a year to the then reversioners of her husband's estate. In 1923, one Gopalhari Ghose obtained a money decree in a suit for contribution against Brojobhamini and in execution of this decree the three anna four ganda share of the widow in the five touzi properties mentioned above together with some other properties were put up to sale on 9th April 1927

and were purchased by Provabati Ghose who is the plaintiff in one of the two suits out of which these appeals arise. After her purchase Provabati sold a 1 anna 12 ganda share in these five touzis to Shudhamoyee Sinha and Sushantamoyee Sinha who are the plaintiffs in the other suit, by a kobala executed on 11th April 1932. She also sold another 16 ganda share in the same properties to one Anukul Chandra Roy and retained with her the remaining share amounting to 16 ganda only.

2. In the meantime, on 16th April 1926, one Ramuttam Ghose Choudhury who claimed to be the sole reversioner to the estate of Harendra from the year 1331 B. S. instituted a suit against Brojobhamini, being Title Suit No. 89 of 1926, in the Court of the Subordinate Judge at Khulna for recovery of a sum of Rs. 2080 alleged to be due to him and the pro forma defendants in the suit who were the heirs of another reversioner named Debnarayan who died in chaitra 1330 B. S., on the basis of the solenama mentioned above, for the years 1329 to 1332 B. S. There were prayers in the plaint for recovery of the amount together with a declaration of charge in respect of the same upon all the properties left by Harendra. There was also a prayer for a decree for sale of the charged properties if the defendant did not pay the money" within the period of grace that might be fixed by the Court. A decree was passed in this suit on 22nd December 1927. The plaintiff was given a decree for a sum of Rs. 888 only with costs and interest which were to be paid by the defendant and the amount was declared to be a charge on the properties specified in the schedule to the plaint. No decree for sale of the charged properties was given as prayed for by the plaintiff. This decree was executed in Money Execution case No. 298 of 1935 and the 3 anna 4 ganda share of Brojobhamini in the five-touzi properties specified above was put up to sale and purchased by the Jessore Loan Company, defendant 4 in both the suits in the benami of defendant 3, an officer of theirs. On 2nd July 1936, it seems, a claim petition was put in on behalf of Provabati objecting to the attachment but it was dismissed for default on 13th June 1936. On 10th May 1937, Provabati commenced the suit (being Title Suit No. 31/37) in the Court of the Subordinate Judge at Khulna for declaration of her title to the extent of 16 gandas in Touzis Nos. 962 to 966 of the Khulna Collectorate on the basis of her purchase in execution of the decree in the contribution suit in the year 1937, and for a declaration that the subsequent sale in Money Execution case No. 298 of 1935 would not affect her title in any way. Sudhamoyee Sinha and Sushantamoyee Sinha who had purchased a 1 anna 12 ganda share in these properties, as stated above, from Provabati, filed another suit being Suit No. 62 of 1937 in the same Court and almost on the same allegations, for a declaration of their title to the extent of 1 anna 12 ganda share in the said properties. The Subordinate Judge who heard the suits decreed one of them in its entirety and the other in part. The title of both sets of plaintiffs was declared in respect of the shares claimed by them in four out of five touzis in suit, namely, Touzis Nos. 962 to 965. As regards Touzi No. 963 the claim of Provabati who was the plaintiff in Title suit No. 31 of 1937, was dismissed on the ground that she being out of

possession, no suit for a pure declaration would lie without a prayer for consequential relief by way of recovery of possession. So far as the other suit was concerned, the claim of the plaintiff was allowed with regard to this touzi as well. There were two appeals taken against these decrees in the Court of the District Judge who heard these two appeals together and by his judgment, dated 21st March 1939, reversed the decision of the trial Court and dismissed both these suits. It is against these appellate decisions that the plaintiffs in the two suits have preferred these two second appeals in this Court. Sudhamoyee and Sushantamoyee who are the plaintiffs in Suit No. 62 of 1937 are the appellants in second Appeal No. 955 of 1939 while Provabati, the plaintiff in Suit No. 31 of 1937, figures as the appellant in Second Appeal No. 1221 of 1939. The questions that require determination in both these appeals are identical.

3. The first and the main question that requires consideration is as to what is the effect of the sale of the properties in execution of the decree in Title suit No. 89 of 1926 upon the rights of the plaintiffs who purported to derive their title to the same under the previous money sale in execution of the decree in the contribution suit. The other question is whether the doctrine of *lis pendens* is attracted to the facts of the present case by reason of the fact that Provabati purchased the disputed properties at a money sale pending the hearing of Title Suit No. 89 of 1926 and if so, how far were her rights affected by the decree made in that suit.

4. Now, so far as the first point is concerned, the determination of the question raised would depend entirely upon the nature of the decree that was passed in Title Suit No. 89 of 1926. It cannot be disputed that if the decree was one for enforcement of a charge which existed in respect of these properties, the sale in execution of the same would wipe away and extinguish whatever rights Provabati had acquired in them by virtue of her purchase at the previous money sale. On the other hand, if by the purchase in money Execution case No. 298 of 1935, defendant 4 merely acquired the right, title and interest of the judgment-debtor, the right of Provabati on the basis of her previous purchase at a money sale could not be affected. We may say that we are not inclined to accept the contention of Mr. Chakravarty that no charge existed on the properties prior to the decree in Title Suit No. 89 of 1926, and that a charge was declared for the first time by the judgment in that suit, and as the purchase of Provabati was earlier than that date she was not in any way affected by the charge. The suit, as we have indicated above, was instituted by Ramuttam Ghose for recovery of money on the basis of the solenama filed in the letters of administration proceedings. It was stated in the plaint that according to the terms of the solenama the amount payable by Brojobhamini was to come out of the estate left by Harendra. It was on the basis of this solenama that a declaration for charge was prayed for in the plaint. The Court simply declared the existence of the charge which was created by the act of parties. It is not open to Brojobhamini or to any other person claiming to derive title from her now to say that as the solenama filed in the letters of administration suit was not registered no valid

charge could be created thereby. As between the parties to the suit and their representatives, the judgment must be deemed to be conclusive and even if the decision was wrong it could not be challenged by them now. We hold therefore that the charge existed from before and it was only judicially recognised by the Court in Title Suit No. 89 of 1926. The real point for our consideration would be, what was the nature of the decree passed in that suit. For the purpose of determining this point, it "would be necessary to examine the prayers made in the plaint. The prayers were of a three-fold character: In the first place, the plaintiff prayed for recovery of a certain sum of money from the defendant. In the second place, he prayed that the decretal amount might be declared to be a charge on all the properties left by Harendra. The third prayer was that if the defendant did not pay the decretal dues within the time fixed by the Court a direction might be given for sale of the properties left by Harendra and described in the schedule of the plaint, for realisation of the same.

5. It is true that the prayers were not properly framed as in a mortgage suit but it seems clear that in addition to the prayers for recovery of money and a declaration of charge in respect of the decretal amount upon certain properties the plaintiff did pray for a sale of the charged properties as well. It appears that during the hearing of the suit the defendant did not press all the other pleas which she had raised in the written statement and the only point which the Court was called upon to consider was whether the amount due to the plaintiff was already paid by the defendant. The Court found, on evidence, that the total amount due by the defendant was Rs. 888 and the concluding portion of the judgment as well as the decree state as follows:

It is hereby ordered that the suit be decreed for the sum found due with proportionate costs and interest and that the amount be declared to be a charge on the properties in the schedule to the plaint.

No decree, either preliminary or final, was passed for sale of any of the charged properties and the decree was both in form and substance one for recovery of money together with a declaration of charge in respect of the decretal dues upon the properties that were specified in the plaint. The proceedings in execution show that the decree was in fact executed as a money decree. The execution case was headed as a money execution case and an order of attachment was issued and the properties were attached before they were put up to sale. We cannot agree with Mr. Bose that the decree should be taken to be a charge decree although it was not drawn up in that form. It may be that in cases where the Court instead of passing a preliminary decree for sale pronounces a final decree all at once the decree made though irregular is not a nullity altogether. But in the case before us no decree for sale either preliminary or final was at all passed and there is nothing in the judgment to indicate that the intention of the Court was to pass a charge decree. It is perfectly clear that the Court did only grant the first two prayers made by the plaintiff in his plaint and refused the third prayer altogether. The decree was therefore a money decree together with a

declaration of charge in respect of the decretal amount upon the plaint properties. The plaintiff in that suit was admittedly a charge-holder and the properties put up to sale were charged properties. It may be urged that such sale was in contravention of Rr. 14 and 15 of O. 34, Civil P. C. : vide Chundra Nath Day v. Burroda Shoondury Ghose ('95) 22 Cal 783; Aubhayessury Dabee v. Gouri Sankar Panday Gobinda Chandra Pal v. Kailas Chandra Pal ('18) 5 A. I. R. 1918 Cal. 705. Even in that case it would not be a void sale altogether as has been held by a Full Bench of this Court in Ashutosh Sikdar v. Behari Lal ('08) 35 Cal. 61 (F.B.). This, however, is not a question in which the plaintiffs are at all interested. As the sale in which defendant 4 purchased the disputed properties must be deemed to be a money sale and not a sale in execution of a decree on a charge we are clearly of opinion that the title of the plaintiff acquired on the basis of the earlier sale must remain unaffected and this prior title could not be affected by the subsequent sale which has not the effect of a sale in execution of a charge decree. We are of opinion that the first point raised in the appeal must be decided in favour of the appellants.

6. In view of our decision on the first point the second point practically loses its importance. We may say however that we do not agree with Mr. Chakravarty that a suit for declaration of charge upon specific immovable property does not come within the purview of Section 52, T. P. Act. A charge may not create an interest in immovable property but all that is necessary for bringing a case within the scope of Section 52, T. P. Act, is that a right in immovable property must be directly or specifically in question. This requirement is obviously fulfilled in a case of this description and we are fortified in the view we are taking by certain decisions of the Madras High Court which are to be found in Pranal Anni v. Lakshmi Anni ('99) 22 Mad. 508:26 I.A. 101, Seetharamanujacharyulu v. Venkata Sabbamma ('30) 17 A. I. R. 1930 Mad. 824. The plaintiff, in our opinion, must be taken to have purchased the property subject to the charge which was declared in Title Suit No. 89 of 1926. If the charge is still unsatisfied it would be open to the charge-holder to take such steps as she might be advised to take in order to enforce the charge. But that is not a question which arises for our consideration in the present case. The result is that we allow the appeals, set aside the judgment and decrees of the Court of appeal below and restore those of the trial Court. In the circumstances of the case we direct that parties will bear their own costs in all Courts.

Akram, J.

7. I agree.