

(1961) 12 GAU CK 0001
In the Gauhati High Court
Case No : M.A. (F) No. 9 of 1961

Tushar Mallika Devi

APPELLANT

Vs

United Bank of India Ltd. and Another

RESPONDENT

Date of Decision : 11-12-1961

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 89, Order 21 Rule 90, Order 21 Rule 91

Citation : AIR 1962 Guw 60

Hon'ble Judges : G. Mehrotra, C.J.; S.K. Dutta, J

Bench : Division Bench

Advocate : B.N. Chaudhury and B.R. Goswami, for the Appellant; S.M. Lahiri, S.K. Chose and J.P. Chatterjee, for the Respondent

Judgement

G. Mehrotra, C.J.—This appeal arises out of an application under Order 21 Rule 90 of the Code of Civil Procedure.

2. The facts leading up to the present appeal are that the Respondent No. 1, which is a Banking Company, advanced money to the Ferndale (Private) Ltd. Shillong, Respondent No. 2. The headquarters of Respondent No. 2 is in Calcutta but the principal place of business is Shillong where it owns the properties known as "Ferndale". A hotel used to be run in this building and it is situate in this area known as "normal area" when the provisions of the CPC apply. Respondent No. 2 had taken a sum of (sic) two lacs as loan from the Respondent No. 1 on a mortgage of the Ferndale properties under a deed dated the 25th January 1946. A sum was brought on the basis of the aforesaid mortgage in the year 1950. On the 23rd February 1954 the suit was compromised and a decree was given to the Respondent No. 1 against the Respondent No. 2 for a sum of Rs. 2,33,000/- by instalments. The Appellant though not impleaded as a party to the suit endorsed the compromise and the endorsement runs as follows:

I, Tushar Kallika Devi, wife of Shri Loknath Joshi, Defdenant No. 2, do hereby agree and undertake not to push my claim it any against the properties of the

Defendant No. 1 till the full satisfaction of the dues of the Plaintiff against the Defendants.

The decree-holder-Respondent No. 1 had to start execution proceedings in the year 1955 in the Court of the Ex-Officio Subordinate Judge, Shillong and the properties known as "Ferndale" were put up for auction. On the 27th April 1959 the property was purchased by the decree-holder for a sum of Rs. 2,25,000/- . The execution had a long chequered career. Originally the properties were sought to be sold in several lots; but, as it was found that no bidders were available and one of the purchasers did not turn up to deposit the entire amount, it was ultimately decided to auction the properties in one lot. After the auction sale an application was filed by the Respondent No. 2, the judgment-debtor, for setting aside the auction sale. The application was rejected and the order of the Subordinate Judge was affirmed in appeal by this Court.

During the pendency of the proceedings, the present Appellant on the 18th May 1959 filed an application under Order 21 Rule 90 of the CPC for setting aside the auction sale. As an appeal was filed by the judgment-debtor, the Ex-Officio Subordinate Judge on the 16th September, 1960 passed an order to the effect that the sale would be confirmed on the, disposal of the application filed by the present Appellant and the proceedings in connection with the application filed by the present Appellant were stayed till the disposal of the appeal by this Court. This Court affirmed the judgment of the Court below on the 12th May 1960. The application of the present Appellant filed under Order 21 Rule 90 of the CPC has been rejected by the Subordinate Judge by his order dated the 6th March 1961 and the present appeal has been filed against the aforesaid order. It should be pointed out that the present Appellant is the wife of the judgment-debtor Shri Loknath Joshi.

3. The contention of the Appellant is that she is a mortgagee of the property as she had advanced a sum of Rs. 83,000/- to the Respondent Opposite Party No. 2. The mortgage deed was executed and registered on the 7th May 1951. The charge was also duly registered with the Registrar of Joint Stock Companies, West Bengal, on the 28th May, 1951. It is, therefore, clear that the mortgage set up by the Appellant is subsequent to the mortgage of the decree-holder on which the decree was obtained. It appears that the mortgage was executed during the pendency of the suit filed by the decree-holder. Mainly the contention of the Appellant is that no opportunity was given to the Appellant to substantiate her case that the property was sold for a very inadequate consideration and the auction sale was resulted in material injury to the Appellant due to the illegality considered in the conduct of the sale inasmuch there was no proper publicity given to the auction sale.

4. An application under Order 21. Rule 90 of the CPC was filed by the Appellant on the 18th May, 1990. The case was fixed for hearing on the 2nd January 1961 by an order dated the 1st December, 1960. On the 2nd January 1961, it appears that an application was filed for adjournment of the case due to the these of the

Appellant. The case was adjourned to 9th January 1961 for hearing. On that date again an application was filed by the Appellant for adjournment. Orders were reserved on this application and 16th January 1961 was fixed orders. The Subordinate Judge could not pass any order on the 16th January, 1961 and the application was adjudged on merits on the 6th March, 1961. The grievance of the Appellant is that the application was disposed of without giving any opportunity to the Appellant to substantiate her case. When an application was made on the 9th January 1961 for adjournment of the case, 16th January 1961 was fixed for passing orders on the said application and without disposing of that application and without giving an opportunity to the Appellant to produce evidence to Subordinate Judge rejected the application on the 6th March 1961. The order-sheet of the 9th January, 1961 runs as follows:

Heard the pleaders for both parties. Fix 16-1-61 for orders on the petition dated 8-1-61.

This shows that the parties were heard on merits and the Subordinate Judge was not inclined to adjourn the case. If the Appellant wanted to produce any evidence on the 9th January 1961 she could have produced the evidence on that date. But the Appellant was not right in thinking that on the 16th January 1961 if an application for adjournment was rejected, she would given Anr. opportunity to produce evidence. That would have been indirectly according to her request for adjournment. The Subordinate Judge has remarked that almost all the objections raised by the Petitioner were raised in the earlier Petitioner filed by her husband and the order passed on that application had been affirmed by this Court in appeal. It is an attempt on the part of the Appellant to request the whole matter again.

The contention of the Appellant is that in the previous application the main point urged was that the sale certificate was not properly drawn up which resulted in substantial injury. This Court held that there was no irregularity in drawing up of the sale certificate and thus the question of any injury did not arise. The point raised in this petition that there was no proper publicity given to the date of the auction sale decided in the earlier petition. In the earlier petition this point was taken but it does not appear to have been pressed in this Court in appeal. Moreover, towards the end of judgment of this Court it was observed that the judgment debtor had failed to establish that the property was sold for a very inadequate consideration. The finding, therefore in effect was that no substantial injury had been caused to the judgment-debtor. In the circumstances the present Appellant is not entitled to a fresh opportunity to show that the property has fetched very meagre price. There is, however, a more formidable point against her. Order 21 Rule 90 at the CPC reads as follows:

90(1) Where any immovable property has been sold in execution of a decree the decree order or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or

conducting it or on the ground of failure to issue notice to him as required by Rule 22 of this Order. Provided

(i) that no sale shall be set aside on the ground of such irregularity, fraud or failure unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity, fraud or failure.

(ii) that no sale shall be set aside on the ground of any defect in the proclamation of sale at the instance of any person who after notice did not attend at the drawing up of the proclamation or of any person in whose presence the proclamation was drawn up unless objection was made by him at the time in respect of the defect relied upon. The Appellant is not a person entitled to a share in the rateable distribution of a assets. She can only be entitled to apply for setting aside sale if her interests are affected by the sale. It is not necessary to refer to large number of authorities on the whose interests can be said to be affected by the auction sale so as to give him a right to move for setting aside the sale under Order 21 Rule 90 Code of Civil Procedure. When the language of Order 21 Rule 90 is compared to the provisions of Order 21 Rule 89, CPC it will also be clear that the word "interests" does not refer to proprietary interest in the property alone. Order 21. Rule 90 gives the right to a person whose interests whether pecuniary, possessory proprietary or mortgagee, are affected by the sale to apply other Order 21 Rule 90. But in my opinion before a person can apply under Order 21 Rule 91 the sale must effect the interest which he claims in the property which has been auctioned and not any interest which has no connection with the property in the question. It will have to be seen on the admitted can say that her in the present case the Appellant can say that her interests have been affected.

In the property in dispute she claims the interest of a subsequent mortgagee. The subsequent mortgagee has interest in the mortgaged property which gives him a right to redeem the prior mortgagee. The sale of the property in execution of a decree for the prior mortgage without impleading the subsequent mortgagee as a party to the suit cannot affect the right of the subsequent mortgagee to redeem him. Even in the cases where the property is sold in execution of the decree on the prior mortgage and the subsequent mortgagee has been impleaded as a party, the sale can only affect his right to redeem and if the right to redeem of the Petitioner is not affected by the sale at all, a cannot be said that his interests have been affected by the auction sale so as to give him a right to apply for setting aside a sale under Order 21 Rule 90.

The Appellant has contended that in view the endorsement on the compromise deed the Appellant was interested that the property should fetch a higher value, so that after paying the prior mortgagee sufficient balance may be left to pay up her mortgage. It is true that it will be in the interest of both the judgment debtor as well as the Appellant subsequent mortgagee that the price fetched should be high. But that does not mean that the interests of the subsequent mortgagee will be affected by the sale in execution at a decree under the prior mortgagee. If the

effect of the endorsement on the compromise was that she became a party to the decree, she cannot re-agitate the points which have already been raised by the judgment-debtor. If however she is not deemed to be a party to the decree by virtue of her endorsement on the compromise her rights in the property as a subsequent mortgagee will not be affected by the sale at all.

5. Mr. Chaudhary for the Appellant has very strenuously contended that if the sale had not taken place in bringing a suit for the enforcement of the mortgagee it may not have been necessary for the Plaintiff to implead the prior mortgagee has after the auction sale he will be compelled to implead the auction-purchaser also as a party to his suit for enforcement of the mortgagee and he will be forced to redeem the prior mortgagee and incur some cost in impleading an additional party. That argument to my mind has no substance. As already pointed out, the interest of the prior ((sic) subsequent?) mortgagee is only to redeem and therefore if he is called upon to (sic) the prior mortgage his interest will not be affected. As to the point that he will have to implead the auction purchases as a party to the suit, the short answer is that he is not objecting in the auction sale and if he is not objecting to the auction sale he will have to implead the purchaser as a party to his suit.

What the Appellant is (sic) objecting is that the property has been sold for inadequate consideration. It is therefore not the case of the Appellant that the sale has offered her interest but that the sale for an inadequate consideration has affected her interest a (sic)on which the Appellant cannot maintain an application Order 21 Rule 90. By the endorsement on the compromise the Appellant has only under taken that she will not push her claim against the properties of the full satisfaction of the dues of the Plaintiff against the Defendants. It was she who had undertaken not to enforce her claim against the property unless the claim of the decree-holder had been satisfied. The decree-holder had never accepted the correctness of her mortgage. The mortgage was executed during the pendency of the suit filed by the decree-holder for enforcement of his prior mortgage and as such it would not have been otherwise effected against the prior mortgagee. The present Appellant may have put that endorsement to safeguard the interests of the decree-holder on a prior mortgage and to avoid her challenging she validity of the prior mortgage. In any view of the matter there is no force in this appeal and it is rejected but in the circumstances the parties will bear their own costs of this appeal.

S.K. Dutta, J.

6. I agree.