Srimati Oramba Sundari Dasi

Vs

Sri Sri Iswar Gopal Jieu

Civil Appeals Nos. 130 and 131 of 1951

(B.K. Mukherjea, Vivian Bose, T.L. Venkatarama Ayyar JJ)

12.03.1954

JUDGMENT

MUKHERJEA J. -

These two analogous appeals, which are between the same parties and involve the same points in dispute, are directed against a common judgment of a Division Bench of the Calcutta High Court dated the 12th of August, 1948, by which the learned Judges affirmed, in appeal, the decision of the Subordinate Judge of Burdwan passed in two analogous proceedings under section 36 of the Bengal Money Lenders Act. The facts material for our present purpose lie within a narrow compass and may be stated as follows : The principal respondents are certain idols, represented by their managing Shebait Ram Govinda Roy. The idols are the family deities of the Roys of Bonpash in the district of Burdwan, and the number of Shebaits being very large, there is a recognised usage in this family that the seniormost member amongst the descendants of the founder acts as the managing Shebait and it is he who manages the endowed properties and looks after the due performance of the worship of the idols. It is not disputed by the parties that it is within the competence of the managing Shebait to borrow money to meet the necessities of the idols and to execute such documents as may be necessary for that purpose. Admittedly Adwaita Charan Roy was the managing Shebait of the deities from 1926 to 1930 and as Shebait, he executed a Hatchita in favour of one Nanitosh Chakraborty some time in April, 1928, on the basis of which he received advances of money from time to time from the latter. The last entry in the Hatchita was made in March, 1929, and the total amount borrowed up to that date came up to Rs. 3,801. Adwaita died in March, 1930, and after his death, Satish Chandra Roy became the managing Shebait and continued to act as such till his death in 1940. There was an adjustment of accounts between Nanitosh, the creditor, in whose favour the Hatchita was executed, and Satish Chandra, the managing Shebait some time in October, 1931, and a sum of Rs. 5,068, having been found due to the creditor, Satish Chandra gave him a renewed Hatchita for that amount. It appears that while Adwaita was still the managing Shebait, a suit was instituted by some of his Co-Shebait, to remove him from his office and pending the hearing of the suit, Ramjanaki Roy, another Co-Shebait, was appointed a Receiver of the debutter property by the court. With the permission of the court, Ramjanaki borrowed from the same Nanitosh Chakraborty three sums of money on three different promissory notes executed respectively on the 27th September, 1929, 1st October, 1929, and 14th January, 1930. The suit was eventually dismissed for non-prosecution after Adwaita's death. Nanitosh died in 1931, and in 1932, his two sons Aditya and Dhirendra, who figure as respondents 14 and 15 in these appeals, instituted two money suits against Satish Chandra, the managing Shebait, in the Court of the Subordinate Judge, Burdwan, being Money Suit Nos. 261 and 262 of 1932, for recovery of the moneys due in respect of the Hatchita and the promissory notes mentioned aforesaid. Both the suits were decreed on the basis of a compromise dated the 23rd July, 1933, and two consent decrees were passed, one

for a sum of Rs. 5,800, and the other for Rs. 2,200, both payable in sixteen yearly instalments with a further stipulation that in default of payment of any one of the instalments, the whole or balance of the decretal amount would become due and payable in each. The instalments not having been paid in either of the cases both the decrees were put into execution. In Execution Cases Nos. 76 and 77 of 1936, arising out of Money Suits Nos. 261 and 262 of 1932, the properties mentioned in Schedule Ka in each case were put up to sale and they were purchased ostensibly by the two decreeholders Aditya and Dhiren. Three years later, Execution Cases Nos. 17 and 18 of 1939 were started again in connection with the said decrees and this time the properties specified in Schedule Kha were attached and put up to sale and they were also purchased by the Chakraborty decreeholders. Finally, in Execution Cases Nos. 163 of 1939 and 5 of 1940, the properties described in Schedule Ga were sold and they were knocked down to Srimati Oramba Sundari Dasi, who figures as the appellant in the appeals before us and who, it may be noted, is the wife of Aghore Nath Roy, a son of Adwaita, the former managing Shebait of the debutter estate. Subsequently, the decreeholders, who purchased Ka and Kha Schedule properties sold them by a registered Kobala to the said Oramba Sundari Dasi on the 26th of July, 1940. The result, therefore, was that the properties described in the three Schedules came to vest in Oramba Sundari, the wife of Aghore Nath Roy. On the 28th August, 1941, the deities represented by some of the Shebaits filed two applications under section 36(6)(a)(ii) of the Bengal Money Lenders Act, praying for the reopening of the two compromise decrees mentioned aforesaid and the passing of new instalment decrees in accordance with the provisions of the Act. There were prayers also for restriction to the deities of all the properties mentioned in Schedules, Ka, Kha and Ga which were purchased in execution of the decrees. The principal opposite parties to these proceedings were the Chakraborty decreeholders, Oramba Sundari, the ostensible purchaser, and Aghore Nath Roy, her husband.

The allegations in the applications, in substance, were that the Chakraborty were mere benamidars for Aghore Nath Roy, who was the real lender and the real decreeholder in both these suits. It was alleged that Aghore Nath Roy purchased these properties in the benami of the decreeholders in two out of the three execution proceedings and in the benami of his wife Oramba Sundari in the third. The subsequent Kobala executed by the Chakrabortys in favour of Oramba Sundari was also asserted to be a fictitious conveyance made in favour of Aghore Nath Roy in the name of his wife. In these circumstances, the judgment-debtors prayed that they were entitled to have the two compromise decrees reopened and on the passing of new instalment decrees to have the properties, which were in possession of the real decreeholder, restored to the deities in terms of section 36(2)(c) of the Bengal Money-Lenders Act. The trial judge decided in favour of the judgment-debtors and granted their prayers in both the applications. Orders were made for reopening of the decrees and making of fresh decrees in their places in accordance with the provisions of the Bengal Money-Lenders Act. Direction was also given for restoration of the properties mentioned in Schedules Ka, Kha and Ga to the deities under the provision of section 36(2)(c). Against this decision, Oramba Sundari took two appeals to the High Court of Calcutta and the learned Judges, who heard the appeals, affirmed the decision of the court below and dismissed both the appeals. Oramba Sundari has now come up in appeal to this court on the strength of a certificate given by the High Court under sections 109(a) and 110 of the Civil Procedure Code.

Mr. Chatterjee, who appeared in support of the appeals, has not challenged before us the findings of fact concurrently arrived at by the courts below, viz., that the appellant Oramba Sundari was a mere benamidar for her husband Aghore in respect of the purchase of Ga Schedule properties in court sale, and also that the Kobala executed by the Chakrabortys in her favour on July 26, 1940, was a fictitious transaction. The point, which he has pressed for our consideration is that in a proceeding under section 36 of the Bengal Money-Lenders Act, it is not open to the court to go behind the

decree and launch an enquiry as to whether the decreeholders on record were in fact benamidars for another person. In other words the contention is that, even if Aghore was proved to have advanced the money upon which the Chakraborty obtained the decrees, in reopening the decrees and in working out the rights of the parties in accordance with the provisions of the Bengal Money-Lenders Act, the court could treat the Chakrabortys alone as the decree holders. For a proper determination of this point, it is necessary to examine the scope of section 36 of the Bengal Money-Lenders Act and the reliefs which the court is competent to grant in terms of that section.

Section 36 of the Bengal Money-Lenders Act sets out the various powers which the court can exercise, if it has reason to believe that the exercise of one or more of the powers will gave relief to the borrower as contemplated by the Act; and one of the powers, which is mentioned in clause (a) of sub-section (1) of the section is to reopen any transaction and take an account between the parties. The drafting of section 36 is indeed obscure and somewhat clumsy, but it is clear, as the Privy Council (Vide Renula v. Manmatha, 72 I.A. 156.) has pointed out, that the power of reopening a transaction, as contemplated by the section, extends to reopening of decrees as well. Sub-section (2) of section 36 contains detailed provisions as to what the court may or may not do when a decree is reopened. It cannot be disputed that the court reopens a decree under section 36(2) only for the purpose and so far as it is necessary to give relief to the borrower in the manner provided for in the Act, namely, to release him from all liability for interest in excess of the limits prescribed by section 30 of the Act. A new decree is passed only for the purpose of substituting the method of accounting sanctioned by the Act for the calculations upon which the original decree was passed and to give an opportunity to the judgment debtor to pay the decree dues thus ascertained by instalments. But save and except for these, the old decree as well as the adjudications made thereunder are not wiped out and the parties are not relegated to their rights and liabilities under the original cause of action (Vide Bank of Commerce Ltd. Amulya Krishna Basu Roy Chowdhury [1944] F.C.R. 126.). How the rights of the parties are to be adjusted and worked out when a decree has been reopened has been dealt with exhaustively in the several clauses of section 36(2) of the Bengal Money-Lenders Act, and an examination of these clauses makes it clear to our minds that an enquiry as to whether the decreeholder was in fact a benamidar for another person in respect of the decree, does not come within the purview of these provisions. Clause (a) of section 36(2) empowers the court to pass a new decree in accordance with the provisions of the Act. Obviously, this new decree is to be passed in favour of the original decree holder and only the calculations upon which the old decree was based would be changed by substituting the statutory method of accounting in place of what rested upon the contract between the parties. Clause (b) and (c) contemplate cases where properties have been sold in execution of the original decree. If the purchaser is the decree holders himself and he is in possession of the property when the decree is reopened, it is incumbent upon the court to order restoration of these properties to the judgment debtor under clause (c). If, on the other hand, the properties had been acquired by strangers either by purchase at the execution sale or from the decreeholder purchaser, their interests would be protected if they have acquired these rights bona fide as contemplated by clause (b). Under clause (d), the court has to order the payment of the decretal amount in such instalments as it thinks proper, and clause (e) further imposes a duty on the court to give a direction in such cases that if there is default in the payment of any one of the instalments, the properties restored to the judgment-debtor under clause (c) would be put back into the possession of the decreeholder. It is quite true that the object of restoring possession of the properties sold in execution of the decree to the judgment-debtor is to enable the latter to pay off the decretal dues, but it is to be remembered that the sale itself is not annulled, and in case of default in payment of any of the instalments, the properties are returned to the decreeholder purchaser. We agree that if the purchaser is a mere benamidar for the decree holder, clause (b), sub-section (2) of

the section would not afford protection to him in any way. He could not be regarded as a person other than the decreeholder acquiring rights bona fide as contemplated by that clause. For the purpose of giving effect to clauses (b) and (c), therefore, the court has not only the right but is under a duty to make an enquiry as to whether the ostensible purchaser at the execution sale, or the person who purports to have acquired an interest therein under a subsequent transfer from the decreeholder purchaser, has bona fide acquired such rights within the meaning of clause (b). But we do not agree with the learned Judges of the High Court that in making a new decree under clause (a) of section 36(2) and giving the judgment-debtor consequential relief under clause (c) of the sub-section, the court can at all enter into the question as to whether the decreeholder on record is himself a benamidar for another person in respect of the decree. Such enquiry, it seems to us, is altogether outside the purview of the different clauses of section 36(2) of the Bengal Money-Lenders Act. These provisions do not recognise any other decreeholder than the one in whose favour the original decree was passed. It is between him and the judgment-debtor that the rights are to be adjusted in accordance with the provisions of the Act; to him would the instalments have to be paid under the new decree, and he alone would be compelled to restore the properties which he had purchased in execution proceedings. None but the decreeholder on record can give a valid discharge or record satisfaction of the decree. This being the position, it is altogether immaterial, in our opinion, that it was Aghore, the husband of the appellant, who really advanced the money upon which the decree were obtained. We must treat the Chakrabortys and the Chakrabortys alone as the decreeholders and see to what extent the provisions of the Act could be applied against them in the circumstances of the present case. So far as the properties described in Schedules Ka and Kha are concerned, it is not disputed that they were purchased by the decreeholders themselves. No price was actually paid by the decreeholders, but the sale proceeds were set off against the decretal dues. The decreeholders, therefore, must be deemed to be the purchasers of these properties within the meaning of clause (c) of section 36(2); and as the subsequent conveyance of these properties in favour of Oramba Sundari, the appellant, has been held by both the courts below to be a fictitious transaction, we must hold that Oramba Sundari did not bona fide acquire any right which could be protected under clause (b) of section 36(2). With regard to these properties, therefore, the order for restoration of possession made by both the courts below should stand. As regards Ga Schedule properties, however, Oramba Sundari was the purchaser at the execution sale and whether or not the money for such purchase was paid by her husband becomes immaterial. This was not the property purchased by the decree holders and there is no proof of the decree holders being in possession of the same either by themselves or through Oramba Sundari. In these circumstances, clause (c) of section 36(2) cannot be attracted in favour of judgment-debtors so far as this property is concerned and the possession of it must remain with the appellant. We, therefore, allow the appeal in part and set aside the order for restoration of possession made by the courts below in respect to the Ga Schedule property. The rest of the decision of the High Court will stand. We make no order as to costs of these appeals.

Appeal partly allowed.

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