CALCUTTA HIGH COURT

Chandra Nath Bagchi

Vs

Nabadwip Chandra Dutt

(Rankin ,J.)

26.08.1930

JUDGMENT

Rankin, C.J.

1. This was a mortgage suit instituted in 1923 and the subject matter of the mortgage appears to be a rice mill and certain properties connected therewith. It is unnecessary to go into details as to the parties defendants in the suit. It is enough to say that there were three defendants and that, on 2nd December 1924, there was a compromise decree according to which one of the parties was to continue in possession as receiver and certain payments were to be made-one payment was to be made immediately and the other payments were to be made in stated instalments. There was a provision in the decree as to the meaning of which some question now arises to the effect that in default of payment of two consecutive instalments by the receiver and in breach of the terms mentioned in Clause (D), that was the covenant to insure the plaintiff will be able to execute the decree without making it absolute as against any or all of these defendants.

2. Now an application for execution of the decree was filed on 14th January 1927 and, instead of noticing that more than a year had elapsed since the date of the decree and instead of issuing notice under Order 21, Rule 22, Civil P.C., the following order was simply passed: "Issue notice under Order 21, Rule 66, Civil P.C." It appears that this notice about the settlement of the sale proclamation was served upon all the three judgment-debtors and on 21st May 1927, the judgment-debtors objected to the valuation. A good many hearings over this question of the valuation to be inserted in the proclamation of sale took place before the learned Judge and finally the learned Judge on 24th May decided that, as there was considerable divergence in the valuation put by either party, the sale proclamation should not issue without the valuation being fixed. His order goes on: As suggested by the decree-holder and agreed to by the judgment-debtor, Babu Benoy Krishna Roy, Secretary, Rice Mill Association, Tollv-gunge, is appointed to fix the valuation.

3. Thereafter this gentleman made his report and there was a great deal of discussion about that and, on 18th June-; 1927, the learned Judge put the valuation, at Rs. 52,000 and directed the proclamation of sale to issue. From that order, there was an appeal taken to this High Court upon the question of valuation and that appeal was dismissed. The case going back to the learned Judge, the judgment-debtors objected among other things in August 1921, that the sale-could not

proceed because originally in; January 1927 no notice under Rule 22, Order 21, Civil P. C, had been issued and: they relied upon the decision of the Privy Council in the case of Raghunath Das v. Sundar Das Khetri A.I.R. 1914 P.C. 129, and upon other decisions in the same sense. The learned Judge gave effect to that objection. He said: It is further pointed out that the judgment-debtor did appear on notice under Order 21, Rule 66 and objected to the valuation which was thereafter fixed. But this does not do away with the objection that there has been no notice under Rule 22.

4. Mr. Chippendale contends before us in like manner that, as it has been held that notice under Rule 22 is a condition' precedent and without it the Court has no jurisdiction, this objection can be taken at any time. The first question on this appeal is whether that contention is correct. In my judgment, it is not correct. It is quite unnecessary to push the abstract logic of the case of *Raghunath Das v. Sundar Das Khetri*[1] to this ridiculous extreme. There was a case-somewhat similar to this before the High-Court of Patna, namely the case of *Fakhrul Islam v. Bhubaneswari Kuer*[2]. In that case, execution had proceeded and an appeal was taken to the High Court on the ground of absence of notice tinder Rule 22 and the High Court set aside the execution proceedings. The case went back to the executing Court and, after further proceedings, a sale was directed. Thereupon an objection was taken that, even so, no notice yet had been served under Order 21, Rule 22 and still the sale was bad. Dealing with that kind of objection, the learned Judge, Kulwant Sahay, J., said: All that Order 21, Rule 22 requires is that an opportunity should be given to the judgment-debtors against whom execution is taken out more than a year after the decree to show cause why execution should not proceed.

5. In my judgment, that is the substance land the meaning of the requirement. I {do not in any way seek to throw doubt upon the proposition that where such a notice has not issued and the party who entitled to notice does not in substance [get notice and is not given or does not take an opportunity to object to the execution of the decree, the sale which follows will be without jurisdiction in the sense that, even if the sale is to a stranger, the sale will not be binding or valid. The parties in the present case have been litigating actively with each other upon the question whether this execution should proceed and how it should proceed. I have pointed out that, at one stage of the case, the matter was by agreement referred to a gentleman to report as to the amount of the valuation to be inserted in the proclamation of sale. In the appeal which came previously before this Court, there was an affirmation that the sale was to take place and the proclamation was to issue. It appears to me to be merely piling unreason upon technicality to hold upon the circumstances of this case that it is open to the judgment-debtors on these grounds to object to the jurisdiction of the Court because they have not got a formal notice to do something, namely to dispute the execution of the decree when in point of fact they were busy disputing about it in all the Courts for the best part of the last two years. I decline to push the doctrine so far as that and it seems to me that the execution should proceed.

6. The next question is as to the proper construction of the consent decree. The learned Judge has pointed out that the words are in default of payment of two consecutive installments by the receiver and in breach of the terms mentioned in Clause (D);and he says that the word is "and" and not "or" and that therefore this decree for instalments cannot be executed unless two instalments are in arrear and also there is a failure to insure. When one looks at the clause, it becomes abundantly apparent that it is not a clause framed in accurate and precise language by somebody who knows the value and meaning of the words used. It cannot mean "and in default of breach." It seems to me that we must look at the substance of the matter to see what

construction can reasonably be put upon the clause. If it means that in order to have a right to execute the decree not only must two instalments be in arrear but also there must be a failure to insure, then so long as two instalments are not in arrear there is nothing to compel the mortgagor to insure so far as this clause is concerned. In the same way, so long as he insures, there is nothing to prevent default in paying all the instalments one after the other without bringing the clause into operation. This is a most extraordinary intention. I think this clause should be read as meaning that, in default of payment of two consecutive instalments, the plaintiff will be entitled to execute the decree and in case of a breach of the covenant to insure the plaintiff will be entitled to execute the decree.

7. In these circumstances, I think that the appeal should be allowed and the case should go back to the Court of the learned District Judge in order that execution may proceed. The costs of this appeal must be given to the appellant. The hearing-fee is assessed at two gold mohurs.

C.C. Ghose, J.

8. I agree.

Cases Referred.

1A.I.R. 1914 P.C. 129
2A.I.R. 1929 Pat. 79