PATNA HIGH COURT

Rajkishore Lall

Vs

Begum Sultan Jehan

A.F.O.O. No. 264 of 1951

(Das and Ramaswami, JJ.)

16.07.1952

JUDGMENT

Ramaswami, J.

1. This appeal is brought on behalf of the decree-holders against an order of the Subordinate Judge of Gaya deciding that the properties belonging to respondent Begum Sultan Jehan are not liable to be sold in the execution proceedings.

2. The essential facts are as follows. On 1-9-1917 defendant, Maharaj Kumar of Tekari, granted an annuity of Rs.600 a month in favour of Babu Nandkishore Lal, ancestor of the decree-holders, creating a charge on certain properties including the properties mentioned in schedule 1A of the execution petition. In 1935, the decree-holders brought a suit in which they claimed arrear of annuity from April 1930 to February 1935 and in default an order for the sale of the properties charged. On 4-4-1940 the suit was decreed. In appeal the High Court affirmed the decree of the Subordinate Judge making a slight modification with respect to the order of the properties to be sold. In Execution Case No.46 of 1947 the decree-holders applied for execution of the decree. In the course of execution, respondent no. 1 Begum Sultan Jehan purchased the properties described in schedule 1A for a sum of Rs.44,000 and odd in the execution case. The sale took place on 20-9-1948. Meanwhile the decree-holders brought a second suit (Title Mortgage Suit No.32 of 1947) for arrear of maintenance for the period from May 1935 to May 1937. In this suit, a preliminary decree was granted on 17-5-1948. A final decree was obtained on 15-9-1949. The decree-holders then sought to execute this decree against properties other than those purchased by the respondent. The judgment debtors objected that Begum Sultan Jehan should be made a party in the execution case and her properties described in schedule 1A should be sold first before other properties were sold in satisfaction of the decree. The objection was based on the circumstance that in Title Mortgage Suit No.32 of 1947 the order in which the properties should be sold had been fixed by decree of the court. The decree-holders were directed to realise

the annuity (1) firstly from the properties in the hands of defendant No.1, (2) secondly from the properties transferred to Kumar Rani Sayeeda Khatoon, defendant No.5, (3) thirdly from the properties sold to Rani Bhuneshwari Koer by defendant No.1, (4) fourthly from the properties transferred to Siya Singh, and (5) fifthly from the properties in the hands of defendant No.16, Maharaja of Darbhanga. The decree-holders applied for amendment of the execution petition by adding respondent as a party and including her properties. The amendment was allowed on 9-10-1950 by the Subordinate Judge. The respondent Sultan Jehan then appeared in the case and objected that she had no notice of the second decree nor she was aware of the direction given by the court with respect to the order in which the properties were to be sold. On 6-10-1951 the Subordinate Judge upheld the objection of Sultan Jehan holding that she had no notice of the decree granted in Suit No.32 of 1947 and that the properties described in schedule 1A were not therefore liable to be sold in the execution case.

3. In support of this appeal, Mr. Rajkishore Prasad addressed the argument that the purchase by the respondent of schedule 1A properties was affected by the doctrine of 'lis pendens' and it is immaterial whether she had notice of the second decree or not. It is true that the doctrine of 'lis pendens' applies to purchase at auction sale in execution of a decree against the parties to the suit as well as to private alienations by the parties But, in my opinion, the purchase by the respondent of schedule 1A properties in the present case is not affected by the doctrine of lis pendens. In - *'Bellamy v. Saline[1]',* Lord Cranworth explained that the doctrine of lis pendens was intended to protect the parties to litigation against alienations by their opponents pending suit. He observed that lis pendens affects a purchaser

> "not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property, in dispute so as to prejudice the opposite party."

Later on he stated "pendente lite neither party to the litigation can alienate the property in dispute so as to affect his opponent", and in - *'Faiyaz Husain Khan v. Prag Narain'[2],* Lord Macnaughten, delivering the judgment of the Judicial Committee in a case governed by Section 52, Transfer of Property Act referred to this as the 'correct mode of stating the doctrine'. The principle on which the doctrine of lis pendens rests is therefore applicable only as between opponents with regard to alienations made by any one of them during the pendency of the suit. The doctrine cannot be applied as between parties to a suit who are arrayed upon the same side and between whom there is no dispute to be adjudicated. It was argued by Mr. Lalnarain Sinha on behalf of the respondent that an auction purchaser in a mortgage suit is representative of the decree-holders and in support of his argument Counsel relied upon - *'Karamat Ali v. Gorakhpur Bank, Ltd.[3]',* and - *'Arthanari Chettiar v. Nagoji Rao[4]',* Applying the principle to the present case, it is manifest that the respondent and decree-holders are arrayed in the same camp and that the purchase by the respondent is not affected by the doctrine of lis pendens.

4. There is another important reason for rejecting the argument of the appellant. The respondent purchased the properties in dispute on 20-9-1948 in execution of the first decree for a sum of Rs.44,000 and odd. The sale proclamation is dated 30-6-1948 and though the preliminary decree in the second suit was passed on 17-5-1948 there is no mention in the sale proclamation that the properties to be sold were subject to the
charge imposed by the second decree and liable to be sold first in the order of properties mentioned therein. It should be noticed that the second decree is for a sum of Rs.87,000 and odd exclusive of interest and if this fact was mentioned in the sale proclamation it is highly improbable that Begum Sultan Jehan would have paid a sum of Rs.47,000 and odd for the purchase of the properties. In the context of these facts it is manifest that a foundation is laid for the plea of estoppel against the appellants. It was their duty as execution creditors to specify the judgment-debtors' interest in the property so far as they had been able to ascertain the same (Order 21 Rule 13). It was also imperative that the sale proclamation should have specified as clearly and as accurately as possible any encumbrance to which the property was liable (Order 21 Rule 66). Since the respondent has suffered detriment on account of this default, the decree-holders would be estopped from raising the plea that the purchase is affected by the doctrine of lis pendens. This view is supported by - *'Mangat Rai v. Dulil Chand*[5]*',* in which A, in execution of a decree against B, brought B's property to sale and purchased it. At B's instance the sale was set aside. A filed an appeal against the order setting aside the sale, and pending the appeal B sold the property to C.C deposited the amount of the decree in Court. A withdrew this amount in full satisfaction of his decree. It was held by the High Court that A having elected to take the money was estopped from pleading that the sale to C was subject to lis pendens.

5. I next turn to the question whether the auction purchaser at a sale in execution of a decree can avail himself of the plea that he is a *bona fide* purchaser for value without notice of an equitable claim. The argument for the appellants is that such an equitable claim is enforceable against a subsequent transferee, even if he purchases *bona fide* without notice of the charge. Now Section 100, Transfer of Property Act, states:

> "Where immoveable property of one person is by act of parties or operation of law made security for the payment of money to another and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge."

There is a proviso that nothing in this section applies to the charge of a trustee on the trust-property for expenses properly incurred in the execution of his trust, and,

> "save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge."

The question arises whether a purchase in execution of a decree in a court sale can be regarded as a transfer for consideration within the meaning of the section. In this context, it is important to remember that in sales by private party there is a warranty of title and there is a further warranty that the property sold is free from encumbrances and charges. But in execution sales there is no warranty of title nor is there any warranty that the property sold is free from encumbrances and charges. In
English law the equitable rule that charges which create no interest in land cannot be enforced against a purchaser for consideration has not been applied with respect to execution creditors. In - *'Wickham v. New Burnswick and Canada Railway Co[6].',* Lord Chelmsford in delivering the judgment of the Board observed as follows:

> "There is no doubt upon principle, as well as on the authority of the cases cited in the argument at the Bar, that the right of a judgment creditor under an execution is to take the precise interest and no more, which the debtor possesses in the property seized, and consequently that such property must be sold by the Sheriff with all the charges and encumbrances, legal and equitable, to which it was subject in the hands of the debtor. In other words, what the debtor has power to give is the exact measure of that which the execution creditor has the right to take."

In - *'Madell v. Thomas and Co.[6]',* Kay, L.J., observed as follows: "A trustee in bankruptcy or execution creditor is in privity with the bankrupt or execution debtor. He takes under the bankrupt or execution debtor not like a purchaser for valuable consideration, and it has been decided over and over again that he only takes what was vested in the bankrupt or execution debtor. Where property is subject to any rights by which it would be bound in the hands of the bankrupt or execution debtor nothing can be more clear as a general proposition than that it would be subject to such lights as against the trustee in bankruptcy or execution creditor." In Halsbury's Laws of England, volume 13, Hailsham edition, para 87, the law on this subject is stated as follows:

> "Ordinarily, as assignee takes subject to all equities to which the assignor was subject; and this is the case where the assignee is a volunteer, and also where he is a purchaser for value if he has notice of the circumstances which raise the equity. But if he is a purchaser for value without notice, the equity cannot be asserted against him. Trustees in bankruptcy and judgment or execution creditors take only what was vested to the bankrupt or debtor; hence they do not rank as purchasers but take subject to prior equities."

But the legal position is different in India. Section 100, Transfer of Property Act, expressly enacts that no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration. The preamble to the Act states that the Act is meant to define and amend the law relating to transfer of property by act of parties; and

Section 5 defines the expression "transfer of property" as a transfer by act of parties. But Section 2(d) states : "But nothing herein contained shall be deemed to affect.....(d) save as provided by Section 57 and Chapter IV of this Act. any transfer by operation of law or by, or in execution of, a decree or order of a Court of competent jurisdiction". Since Chapter IV deals with mortgages and charges and Section 100 is included in this chapter, it is manifest that the expression "transferred for consideration" in Section 100 is wide enough to include an auction sale in execution of a decree. This opinion is supported by a Full Bench decision of the Allahabad High Court in - *'Municipal Board. Cawnpore v. Roop Chand Jain*[7]*',* and a Full Bench decision of the Oudh Chief
Court in - *'Mostt. Indrani v. Maharaj Narain*[8]*',*

6. The question therefore arises whether the respondent purchased the property in execution sale without notice of the second decree. It was argued by Mr. Rajkishore Prasad that the respondent was daughter-in-law of Kumar Rani Sayeeda Khatoon. one of the defendants, in Title Suit 32 of 1947. But it is not possible to conclude from this circumstance alone that the respondent had notice of the second decree. Learned Counsel also stated that the deed of annuity of 1917 was a registered document and the respondent must be deemed to have constructive notice. But the order in which the properties should be sold for satisfying the annuity charge is specified only in the second decree, of which the respondent had no notice, actual or constructive. It follows that the respondent who was a *bona fide* auction purchaser at the sale in execution of the first decree is not bound by any equitable right or claim binding on the judgment-debtor in respect of the second decree. The respondent is likewise not bound by the direction in the second decree determining in which order the properties charged should be sold for the purpose of realising the amount of annuity decreed.

7. For these reasons I hold that this appeal fails and must be dismissed with costs.

Das, J.

8. I agree.

Appeal dismissed.

Cases Referred.

[1](1857) 1 De. G. and J. 566
[2]29 All 339 at p.345 (PC)
[3]44 All 488
[4]14 Ind Cas 836 (Mad)
[5]55 All 735
[6](1891) 1 QB 230
[7] ILR (1940) All 669
[8] 13 Luck 101 (FB)