

Gouri Dutt Maharaj - - - - - Appellant

v.

Sheikh Sukur Mohammed and others - - - Respondents

FROM

THE HIGH COURT OF JUDICATURE AT
FORT WILLIAM IN BENGAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 6TH APRIL, 1948

Present at the Hearing :

LORD NORMAND

LORD MACDERMOTT

SIR JOHN BEAUMONT

[*Delivered by* LORD MACDERMOTT]

This appeal is from a judgment and decree of the High Court at Fort William in Bengal (Mukherjea and Pal JJ.) dated the 27th August, 1942, which substantially varied the judgment and decree, dated the 24th November, 1939, of the Court of the Subordinate Judge at Asansol in a mortgage suit brought by the present appellant as mortgagee.

The facts material to the issues now calling for determination may be stated as follows.

On the 15th November, 1931, Sheikh Sukur Mohammed, the first named respondent (hereinafter called the mortgagor), obtained a lease of some three-fifths of an acre in the town of Asansol for three years at a rent of Rs.12 per month and with a right of renewal. The mortgagor proceeded to construct a cinema on this plot and, falling short of funds, took into partnership Oscar Gerald Birt and Pramatha Nath Mukherjee (hereinafter called the new partners) who were, it appears, the predecessors in title of the respondents other than the mortgagor. This transaction was effected by an unregistered agreement in writing of the 8th June, 1932, which provided (a) for the carrying on of the cinema business in partnership by the mortgagor and the new partners, with the former having an eight annas interest and each of the new partners a four annas interest, and (b) for the sale by the mortgagor to the new partners of the mortgagor's eight annas interest, or half share, in the cinema business and its assets, which included the leasehold already mentioned, for the sum of Rs.15,000 "free from all encumbrances". The parties to this agreement fell out and on the 20th September, 1932, the new partners commenced a suit—No. 229 of 1932—against the mortgagor. In this suit the new partners pleaded the agreement of the 8th June, 1932, alleged that they had advanced thereunder a sum of Rs.17,375 and claimed, *inter alia*, specific performance of the said agreement for sale and, alternatively, a decree for the said advance of Rs.17,375 with a declaration that it and costs were a first charge on the premises described which included the said leasehold. On the next day, the 21st September, 1932, the mortgagor

executed a mortgage deed of the said leasehold, with fittings and equipment, in favour of the appellant to secure an advance of Rs.6,000 with interest. This was a simple mortgage, duly registered, and the present suit is founded upon it.

Suit No. 229 (to which the appellant was throughout a stranger) ended in a compromise between the mortgagor and the new partners which was reduced to writing and was framed on the basis that the new partners should drop out of the cinema business and relinquish their rights under the agreement of the 8th June in consideration of the mortgagor paying them a sum of Rs.18,500 in respect of moneys advanced and costs of suit. It is unnecessary to explore the full detail of this document, but the following stipulations therein are material and must be set out:

Clause 2. "That a final decree for the aforesaid sum of Rs.18,500 will be passed in favour of the plaintiffs and that the defendant will make payment of the said decretal sum by monthly payment as described below."

Clause 6. "That the decretal dues of the plaintiffs as stated above are a first charge on the Cinema house, lands, machineries, plants, tools, furniture, equipment, etc., mentioned in the Schedule below and shall continue a first charge till full satisfaction of this decree."

Clause 12. "That the defendant assures the plaintiffs that there is no charge or mortgage on the properties mentioned in the Schedule below save and except one mortgage in favour of Gouri Dutt Maharaj of Asansol for Rs.6,000 (six thousand) subsequent to the aforesaid agreement dated 8th June, 1932."

The Schedule referred to specified the leasehold in question. The compromise was accepted by the Subordinate Judge at Asansol on the 17th November, 1932, as appears from the final decree in suit No. 229 which ordered that "the suit be decreed in terms of petition of compromise" and directed that the compromise be made part of the decree.

On the 8th July, 1938, the appellant instituted the present suit for enforcement of his mortgage and recovery of Rs.12,000 claimed as then due on foot thereof. The mortgagor did not contest the suit. Of the various defences raised by the other defendants the only one now material is the plea of those representing or claiming through the new partners, both of whom are dead, that the mortgage was effected during the pendency of suit No. 229 and that, in consequence, the appellant's claim was not maintainable by reason of the provisions of section 52 of the Transfer of Property Act, 1882. That section, as amended, reads thus:

"During the pendency in any court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

Explanation.—For the purposes of this Section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the Plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force."

The Subordinate Judge held against the defence based on section 52 and found in favour of the appellant, the principal ground of his decision being that the agreement of the 8th June, 1932, should have been registered

and that, as this had not been done, it was inadmissible in evidence and could not create a valid charge. On appeal, the High Court upheld the defence in question and set aside the decree appealed from save as respects the mortgagor.

The only question for determination by the Board is whether, in these circumstances, section 52 of the Transfer of Property Act affected the appellant's mortgage. It was conceded, and rightly in the opinion of their Lordships, that this mortgage was executed during the pendency of suit No. 229, that it "transferred or otherwise dealt with" the land in question within the meaning of the section, and that the expression "decree or order" therein includes a decree or order made pursuant to agreed terms of compromise. Collusion was not suggested and it was admitted that the mortgage had not been made with the authority of the Court. It may, indeed, be that the mortgagor had no chance to seek such authorisation for it does not appear that he was aware of the suit when he mortgaged on the day following its commencement.

In the opinion of their Lordships there can be no doubt that in suit No. 229 a right to immovable property—the leasehold on which the cinema was erected—was, in the words of the section, "directly and specifically in question" both on the claim for specific performance and the alternative claim for the declaration of a charge in respect of the sum advanced. The broad purpose of section 52 is to maintain the *status quo* unaffected by the act of any party to the litigation pending its determination. The applicability of the section cannot depend on matters of proof or the strength or weakness of the case on one side or the other in *bonâ fide* proceedings. To apply any such test is to misconceive the object of the enactment and, in the view of the Board, the learned Subordinate Judge was in error in this respect in laying stress, as he did, on the fact that the agreement of the 8th June, 1932, had not been registered. Had the question now under consideration fallen to be determined before the compromise and final decree in suit No. 229 the appellant's mortgage would clearly have been subject to the provisions of the section as, whatever course the suit might ultimately have taken, no one could then have said, without prejudging the issue, that the mortgage would not affect the decretal rights which the plaintiffs might yet obtain in the proceedings.

It was, however, contended on behalf of the appellant that in the circumstances of the present case the position had to be regarded in the light of the compromise decree. The argument raised two distinct points. First, it was said that this decree accorded rights which were not claimed in the plaint and was, so to speak, outside the scope of the litigation. Their Lordships are unable to accede to this submission. It may well be that section 52 does not contemplate a decree or order which is entirely alien to the issues raised between the parties. The wording is—"any decree or order which may be made therein", that is, in the suit or proceeding. But it applies to a compromise decree and such a decree cannot, by reason of its very nature, be expected invariably to reflect the precise relief claimed. Here the plaint sought, as an alternative to specific performance, a charge on the property in question. In substance the compromise decree provided for that relief and the fact that the plaintiffs, by the terms of the compromise, relinquished their rights under the agreement of the 8th June, 1932, cannot, in the view of the Board, lead to a different conclusion.

The second point turned on the construction of the compromise and was to the effect that the parties thereto had agreed that the appellant's mortgage should have priority and that it, accordingly, did not conflict in any way with the rights flowing from the compromise decree. This point was rested on clause 12 of the compromise which stated that, subsequent to the agreement of the 8th June, 1932, there was no mortgage on the property in question save the appellant's. Had it mentioned the date of the mortgage and used language apt to indicate that the parties regarded it as entitled to priority, the case for implying a modification of the terms of clause 6, which expressly provided that the decretal dues should be a first charge, would be appreciably stronger. As clause 12 stands, however, their

Lordships cannot agree that it suffices to qualify the clear and emphatic provisions of clause 6 or to preclude those now representing the plaintiffs in suit No. 229 from taking advantage of such infirmities as have attached to the appellant's security.

For these reasons their Lordships are of opinion that the decision of the High Court was right and should be affirmed. They will therefore humbly advise His Majesty that the appeal be dismissed. The respondents did not appear and there will be no order as to the costs of the appeal.

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In the Privy Council

GOURI DUTT MAHARAJ

2.

SHEIKH SUKUR MOHAMMED
AND OTHERS

DELIVERED BY LORD MACDERMOTT

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