

Sheo Kumar and anr. Vs. Balgobind and Mahtab Kuar and anr.

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Court : Allahabad

Decided On : May-30-1924

Reported in : (1924)ILR46All864

Judge : Walsh, Acting C.J. and ;Ryves, J.

Appellant : Sheo Kumar and anr.

Respondent : Balgobind and Mahtab Kuar and anr.

Judgement :

Walsh, Acting C.J. and Ryves, J.

1. These are three appeals by certain second mortgagees, and a lessee of the mortgagor, against an order of the Subordinate Judge of Cawnpore, dated ,the 7th of September, 1922, rejecting an application fo set aside under Order IX, Rule 13, of the Code of Civil Procedure a decree absolute for foreclosure. The parties are persons of position, but the history of the case illustrates the astounding complications and delays whch arise in this country, in effecting service, in fixing dates for hearing, in determining the real controversy between the parties, and in enforcing decrees, and also the difficulties with which' this Court is frequently confronted, owing to the gross negligence of the officials in the subordinate courts, instances of which generally come to our notice when it is too late to investigate the matter with any hope of saddling the responsibility on the right shoulders. This case, in which the only substantial issue, namely, how much is due under two

ordinary mortgages, might have been settled in less than three hours, has taken three years in the lower court, and owing to the transfers of judicial officers, which have taken place, has passed through the hands of four Judges. It is now nearly eighteen months since the appeal was admitted in this Court.

2. The plaintiffs are the minor children of the deceased mortgagee, Ran Charan Shukul, suing under the guardianship of their mother. The defendants were one Gauri Shankar the original mortgagor, who died pending the appeal, Musammat Gyan Devi, widow of a deceased District and Sessions Judge of this Province, Jwala Devi, her daughter, who are second mortgagees, and Bal Gobind, an Honorary Magistrate, husband of Jwala Devi, and lessee of the mortgaged property.

3. The difficulties which have occurred in effecting service from time to time, partly owing to the fact that Gyan Devi is a purdanashin lady living at Agra, and partly to the desire of the defendants to gain time, are fully set out in the elaborate judgment of the Subordinate Judge. For the purpose of reference, the following schedule of dates, which was prepared by the parties, may be useful:

1. Suit filed 2nd December, 1919.
2. Date fixed for written statement 7th January, 1920.
3. Court found summons not served 5th January 1920.
4. Date fixed for written statement 30th January 1920.
5. Ex parte decree passed by Babu Lachmi Narain
(Order sheet says Order XXXIV, Rule 4) ... 30th January, 1920.
6. Defendant's application to set aside ex parte decree.

In this application Gauri Shankar, defendant,

did not implead Gyan Devi ... 25th February, 1920.

7. Date fixed for hearing application 13th March, 1920.

8. Gauri Shankar applied to implead Gyan Devi and for issue of notice to all un-served ... 13th March, 1920.

9. Date fixed for application for restoration ... 10th April, 1920.

Notices served on minor plaintiffs' guardian, Lachmi Kuar, personally and Balgobind personally and by affixation on Jwala Devi and Gyan Devi.

10. Case adjourned for personal examination of Gauri Shankar to ... 1st May, 1920.

11. Balgobind applied to set aside the ex parte decree ... 10th April, 1920.

12. Both applications for setting aside ex parte decree ... 1st May, 1920.

13. Accounts produced under order of court by defendant Balgobind ... 19th May, 1920.

14. Application adjourned several times till ... 17th January, 1921.

15. Subordinate Judge Lachmi Narain passed order setting aside ex parte decree ... 20th January, 1921.

16. Date fixed for issues ... 1st February, 1921.

17. Written statement filed by Gauri Shankar, Balgobind and Jwala Devi ... 1st February, 1921.

18a. Judgment of Lachmi Narain 5th February, 1921.

18b. Foreclosure decree passed ... 5th February, 1921.

Defendants allowed usual six months. Gyan Devi did not contest.

19. Six months expired on ... 5th August, 1921.

20. Present application for decree absolute 30th August, 1921,

21. Date fixed for hearing application 28th September, 1921.

Notices sent as follows :--

Gyan Devi....Agra. Gauri Shankar...at

Satti Chaura. Balgobind and Jwala Devi...at Kursawan.

22. Case taken up. It was found that notice to Gyan Devi had not returned and that serving officer's report showed that Gauri Shankar was inside the house at Satti Chaura but would not come out. Notices affixed.

Similar report with regard to Balgobind and Jwala Devi 28th September, 1921.

23. Mr. Aghornath Mukerji declared service sufficient and ordered case to be put up ... 26th November, 1921.

24. Notice to Gyan Devi had not returned and case postponed. Court ordered fresh notices to issue for Jwala Devi, Balgobind and Gauri

Shankar 14th January, 1922.

25. Gauri Shankar's notice returned unserved with the report that he was not at Satti Chaura but at Sariyan (Unao district). Notices on Balgobind and Jwala Devi served by affixation. ... 14th January, 1922.

26. Gyan Devi served personally 17th December, 1921.

27. Babu Raja Ram, Subordinate Judge, held service insufficient. Case fixed for 18th February 14th January, 1922.

28. Notices to Balgobind and Jwala Devi sent by registered post had come unserved, and Gauri Shankar's notice not returned 18th February, 1922.

29. Case postponed to ... 2nd March, 1922.

30. Plaintiffs' application and affidavit for substituted service 2nd March, 1922.

31. Court ordered substituted service by affixing copy on the outer door and by beat

of drum and by publication in "Alburid" and
fixed 25th March for hearing 3rd March, 1922.

32. Case called on. Defendants absent. As
'Alburid' had not come, case again postponed
to 1st April ... 25th March, 1922.

33. Case again postponed for the same
reason 29th April, 1922.

34. Case taken up. Defendants absent and court
passed ex parte order for final decree
for foreclosure ... 29th April, 1922.

35. Application by Gauri Shankar, Jwala
Devi and Balgobind to set aside the
above order 21st June, 1922.

36. Applicants applied to be allowed to pay the
money and deposit it in court. No
order 29th July, 1922.

4. The original decree in the suit was passed ex parte in January, 1920. It was, however, set aside by Babu Lachmi Narain Sahib, Subordinate Judge of Cawnpore, in January, 1921. The suit was one for foreclosure, and claimed that relief. It was heard on the merits and decided by the learned judge on the 5th of February, 1921. The defendant, Gauri Shankar, put in no defence. The issues were settled as follows:

(1) What sum, if any, are the plaintiffs entitled to on the basis of the mortgage bonds, dated the 4th of January, 1912, and the 25th of May, 1912?

(2) Whether the interest at 9 per cent. per annum with six monthly rests is penal?

5. Presumably the defendants, who were interested in the equity of redemption, were desirous of saving the property from foreclosure, and of obtaining from the court a decision as to the actual amount due under the mortgages. The learned Judge gives no reason, but in his judgment he ascertains and decrees the amount due, less a sum for proportionate costs, and awards to the plaintiffs interest at the contractual rate till the period of grace, namely, six months, and thereafter future interest at the court rate, in terms of Order XXXIV, Rule 4, of the Code of Civil Procedure, allowing six months for payment before sale. It is quite clear that this provisional decree was a provisional decree for sale. In the recital of the plaintiffs' claim, the learned Judge describes the suit as one for recovery of the amount due by sale of the hypothecated property. The plaintiffs throughout have relied upon the fact that they were asking for foreclosure. But it is evident from the judgment, that either they modified their claim and asked for a sale, or the learned Judge, in the exercise of his discretion under Order XXXIV, Rule 4, Sub-section (2), of the Code of Civil Procedure, intended to pass a 'decree for sale in lieu of a decree for foreclosure. This is made evident by the operative part of the judgment citing Order XXXIV, Rule 4. Rules 2 and 3 relate to the preliminary and final decrees in a foreclosure suit, but Rule 4, Sub-section (2), provides that in a suit for foreclosure, if the plaintiff succeeds and the mortgage is not a mortgage by conditional sale, the court may, at the instance of any person interested in the right of redemption, pass a decree for sale in lieu of a decree for foreclosure on such terms as it thinks fit.

6. The decree drawn up in the office of the Subordinate Judge and signed by the Munsarim as the ministerial officer of the court, was a preliminary decree for foreclosure. We have come to the conclusion that the court of the Subordinate Judge had no jurisdiction, in view of the judgment, to draw up such a decree. The Code is clear in insisting that the decree which is drawn up by the court shall be in accordance with the judgment. It will be necessary for this Court to direct an

inquiry in Cawnpore as to the circumstances under which this decree came to be drawn up in this way. In our opinion this decree is invalid and vitiates the whole of the subsequent proceedings which have been taken in the Subordinate Judge's court. The objection is stated in the sixth ground of the appeal of Jwala Devi in the following terms:

The preliminary decree is incorrect and not according to the order of the judgment, dated the 6th of February, 1921, 'and hence the whole proceedings thereafter are null and void.

7. With this view we agree. Whether we ought merely to declare it void, or to set it aside ourselves, is a question of procedure, which, in view of the line taken by the Bar in this case, must be discussed hereafter. It is contended by Sir Tej Bahadur Sapru, on behalf of the plaintiffs, that the defendants knew of the form of the decree. There is certainly no evidence on the record that they did, but it is said that they must have known. It is a priori improbable that they knew. There is no reason why they should have known. Litigation is not conducted in this province by solicitors, who, as a matter of routine, concern themselves with looking at the minutes or the judgment actually drawn up as in an English court. In India the court makes itself responsible for the drawing up and final issue of the decree. An interval of time elapses between the judgment and the decree, and the officer charged with the duty of writing the decree gives notice to the parties of the intention to prepare the decree. But although the defendants were much concerned to save the equity of redemption if they could, they were not concerned, once a decree for sale had been passed, to examine the formal document in which the decree was drawn up. If the officials of the court did their duty, the document would follow the judgment, the total sum being a mere matter of arithmetic worked out on the direction contained in the judgment. It could, not be worse for the defendants than the decision which the Subordinate Judge had given, and was not likely to be better. There is a rule in this High Court that the proposed decree, before being finally passed, should be submitted to and initialled by the vakils on both sides. It is a valuable rule, and it is a practice which has been much followed in the subordinate courts, but there appears to be no rule in the subordinate courts as a matter which this Court may well consider that it would be desirable to rectify.

8. The difference between a decree for foreclosure and a decree for sale is of course considerable. In either case the mortgagor gets 6 months time to pay the money, but after the expiration of that 6 months' period of grace, in the case of a foreclosure the property passes to the mortgagee, and no locus poenitentiae remains to the mortgagor; Whereas in the case of a decree for sale, there is the further delay caused by the preparation of the proclamation of sale, and the fixing of the date, a matter which we understand frequently covers two months or go. Then if the sale is successful, it has to be confirmed by the court and the debtor or mortgagor has still a month within which he may deposit the money with interest and save the property. This is material as indicating that it is by no means surprising to find parties who are interested in preserving the equity of redemption treating the period which must elapse, once a sale has been ordered, before the time is reached when they must make up their minds once for all to pay or lose the property, with considerable indifference. It is a matter ingrained in the habits of the people of this province, and the majority of mortgagors appear to prefer to put off the evil day as long as possible, even though interest at a high rate is running against them'.

9. The lower court seems in its judgment to have been not unnaturally influenced by the indications of procrastination on the part of the defendants in this matter and to have come to the conclusion that they were well aware of the foreclosure decree against them before the 15th of June, 1922--when they say they learnt it through their agent, from a triumphant remark of the munib of the decree-holders, who told them that the decree-holders would obtain possession of the mortgaged property. The learned Judge does not say how and when the knowledge came to them earlier than the 15th of June, and the only evidence of its coming to them is the application upon which the order under appeal was made, which was dated the 21st of June,, 1922, and it was not until a special and supplementary petition was put in by the defendant, Balgobind, on the 29th of July, 1922, that they formally, took objection that the judgment and the notice of hearing for the making of the decree absolute were for sale, whereas the actual decree absolute was for foreclosure.

10. Not the least extraordinary feature of this remarkable case is that the learned Judge himself, from whom this appeal has been brought, in the judgment which is before us, should have missed this point. He says:

The case was then heard on the merits, and the court passed a foreclosure decree under Order XXXIV, Rule 4, of the Code of Civil Procedure' (which it could not do by law) 'on the 5th of February, 1921. allowing the defendants six months within which to redeem. I find from a perusal of the judgment of Babu Lachmi Narain Sahib, that the contesting defendants went to issues only on the amount due under the mortgage deeds and the penal nature of interest.

10. We are unable to understand how the learned Judge could have failed to notice the fundamental error which had occurred in these proceedings, if he had read the judgment of the 5th of February, 1921, and appreciated that he was dealing with a decree for foreclosure.

11. On the 30th of August, 1921, the plaintiffs presented in the court of the Subordinate Judge an application for a decree absolute for foreclosure. This application, although ignoring the judgment, was consistent with the original claim for relief in the plaint and with the decree which they had either dishonestly obtained from an innocent and careless official, or which they had procured from him by chicanery and corruption. Whatever anybody else connected with the case knew on the 30th of August, 1921, they knew quite well that they were not entitled to a final decree for foreclosure and that the preliminary decree was a dishonest proceeding.

12. The next step is perhaps more remarkable than anything which has gone before. On the plaintiffs' application for a decree absolute for foreclosure, the court issued a notice, on the ordinary printed form of notices, to the respondents to show cause why an order for preparation of a decree absolute for sale should not be passed, that they, the plaintiffs, were applying for an order absolute for the sale of the property and informing the defendants that if they had any objection to an order absolute for sale, they should attend the court on the 25th of March, 1922, at 10 o'clock. This notice, we are told, was issued under the signature of the same Munsarim who had drawn up the preliminary decree for foreclosure, and the

matter of the issue of this notice for sale based upon an application for foreclosure, is a further matter upon which this Court will have to direct an inquiry. The greater part of the judgment of the learned Subordinate Judge deals with the difficulties in effecting service and the shifts adopted by the various parties to evade service, no doubt with the object of putting off the sale as long as possible, with the intention of finding the money when they could no longer stave off the sale. They probably had no intention of appearing to resist a decree absolute for sale. There was no reason why they should. They could not hope to resist it successfully, and after the judgment of the 5th of February, 1921, they could not escape the obligation ultimately of providing the money if they were to save the property. But if the decision of the Subordinate Judge is accepted, namely, that they did in fact receive this notice, and in some way or another constructively or in directly knew all about it, then the result is that, having received notice of an application for sale and having deliberately kept away because they could not resist the order, a decree absolute for foreclosure was passed ex parte against them for default in appearing to resist a decree for sale. It is clear that an order so passed cannot stand. It matters little on what ground it is put. It seems to be vitiated by almost every, objection to which an order can be exposed. One of the contentions before us by Sir Tej Bahadur Sapru on behalf of the respondents, was that the case did not come within Order IX, Rule 13, of the Code of Civil Procedure, because the appellants had failed to satisfy the court that the summons was not duly served, or that they were prevented by any sufficient cause from appearing. Assuming that they knew that they were summoned to appear to show cause against legal proceedings which were being taken against them, and that they were not prevented from appearing, and probably never had any intention of doing so, the question still arises whether the summons was duly served within the meaning of Rule 13. The words "duly served" would appear to relate to the method of service but, in our view, a summons cannot be said to be 'duly served,' which is a misleading document, having no relevancy to the real proceeding which is contemplated, and having no reference to the order ultimately passed. Under such circumstances, service, even if effected, is a mere sham, and this is not by mere ex post facto reasoning, because the train had already been laid by the application of the 30th of August for an order for foreclosure.

13. Sir Tej Bahadur Sapru, on behalf of the plaintiffs respondents, argued that no notice is really necessary to show cause against the making of a decree absolute. The learned Subordinate Judge disagreed with this view, and held that the practice in this province, approved by the High Court, was to give such notice. We do not propose to follow the respondents' counsel into these high flights of procedure. It is only a rule of practice at the best, and no rule can apply so D as to render the issue of a false notice equivalent to the absence of any notice at all.

14. It is difficult to acquit the plaintiffs of complicity in the scheming by which this notice was issued. It is difficult to suppose that it was done by the Munsarim as the result of sheer ignorance and incompetence. He must be credited with having had some object to fulfil, or some obligation to discharge in adopting such an astounding departure from the ordinary routine of his office. But in considering the rights of the defendants, these alternative contingencies have no importance. The court issues these notices through its responsible ministers, and, as their Lordships of the Privy Council pointed out in the case of *Kala Mea v. Harperink* (1908) I.L.R. 36 Clac., 323 (334) (in dealing with a litigant who had been tricked as the result of clumsy misrepresentation by one of the court's sale officers):

It is incumbent on the court to be scrupulous in the extreme, and very careful to see that no taint or touch of fraud or deceit, or misrepresentation is found in the conduct of its ministers. The court, it is said, must at any rate not fall below the standard of honesty which it exacts from those on whom it has to pass judgment. The slightest suspicion of trickery or unfairness must affect the honour of the court and impair its usefulness.

15. To paraphrase their Lordships' final sentence in this connection, 'it would be disastrous, it would be absolutely shocking, if this Court were to enforce against a mortgagor, or any one interested in the equity of redemption, a foreclosure decree, when he had been misled by its duly accredited agent through the issue of a notice for a decree for sale.'

16. The mortgage debt is under Rs. 18,000. The mortgaged property is said to be worth at least Rs. 45,000. Some one is obviously concerned to save the equity of redemption. We are of opinion that no summons for making a decree absolute for

foreclosure was ever served at all, and that the decree obtained was irregular and must be set aside.

17. We now come to the question of procedure which has been much argued before us. It was suggested on behalf of the plaintiffs respondents, when they began to realize that the ex parte decree absolute was doomed, that we ought to send the case back, and allow the parties to renew the conflict as from April, 1922, when the decree which we now set aside was obtained, and renew it, probably before a fifth Judge, at such time as the court, already overwhelmed with Work, is able to fix, after fresh devastating efforts to serve such of the defendants as may then be still surviving, or their legal representatives. We are unable to take this view. We are seised of the whole matter. The record is here. The rights of the parties are clear. The preliminary decree, even after the expiration of 3 years and 4 months, ought to follow the judgment. In our opinion, as we have said, the preliminary decree of the 5th of February, 1921, is waste paper, and no decree absolute based upon it would be binding on the defendants.

18. Sir Tej Bahadur Sapru, on behalf of the plaintiffs, contended that he was entitled to stand on that decree and to enforce foreclosure, although he had never obtained an order for it from any judicial tribunal. He suggested, further, that if we left the defendants to take such steps as the Code and Rules provide, either by way of appeal or review, to set aside that preliminary decree, he had a complete technical and equitable answer. It is open to his clients, if the case should go further, to raise any objection they may be advised. So far as we were able to follow his argument, he relied upon a, kind of equitable estoppel by conduct. But there can be no estoppel against a litigant arising out of the wrongful acts of the court, permitted or performed by its own officials, and we can see no ground of equity, justice or good conscience, which would justify us in upholding this preliminary decree.

19. The learned Judge says that the defendants were well aware of all that was going on, but the learned Judge himself appears to be unaware that no notice for a decree absolute for foreclosure was even issued from his court. Apart from any provision of the Code, we are of opinion that we have inherent power to correct

such a mistake by any means consistent with the ends of justice. Even if the defendants have not taken every step open to them, or have not shown a prompt sense of their obligation, or a right appreciation of the appropriate procedure, nonetheless--as Lord Justice Bowen said in the case of *Cropper v. Smith* (1884) L.R. 26 Ch. D., 700 (710)--the object of courts is to decide the rights of parties, and not to punish them for mistakes they may make in the conduct of their case, by deciding otherwise than in accordance with their rights. But it seems to us, further, that Section 151 could not be invoked more appropriately than in a case like this, for the purpose of correcting such a miscarriage of justice appearing on the face of the proceedings, and there is abundant authority, which it would be wearisome to cite', there being no case quite analogous to this one, where the Courts in India have held themselves justified, under this salutary provision, in making such orders in the nature of consequential orders, as may be necessary for the ends of justice, and to prevent an abuse of the process of the court, which we take to include the idle multiplicity of proceedings.

20. We, therefore, exercise the inherent powers reserved to us by this section, and set aside not only the decree absolute, but the preliminary decree of the 5th of February, 1921, and restore the parties to their rights and obligations respectively under the judgment of Babu Lachmi Narain of that date. We are satisfied, although every sort of argument was addressed to us designed to show that we had no such powers, that we have power, in the light of what has happened and what must now be done, to extend the time for payment. The six months allowed in 1921 has been effected chiefly by the plaintiffs' own acts. But the Code seems to us to be clear on the subject, as apart from the provisions of Order XXXIV, Section 148 enables a court to extend any time fixed by the court for the doing of any act allowed by the Code. The time fixed by Babu Lachmi Narain was clearly a time which he was allowed by the Code to fix, and we have power to extend it, and we differ from the decisions and dicta which have been cited to us from judgments in this Court which seem to hold that the court has no power to extend the time fixed by its own decree. We are further satisfied that, under Section 151, we have power, not merely to set aside this abortive proceeding but to pass such order as the court ought to have passed itself, and can, if we refer the matter back, still pass. The sole difficulty that has troubled us has been in determining how the

interest should run during this litigious interval. The matter seems to us to be due to faults on both sides, and also to faults on the part of the ministerial officers of the court. In such a matter, interest partakes of the nature of damages, which their Lordships of the Privy Council have said the court may mould according to its wisdom. We think that the plaintiffs ought to have the contractual rate for the period granted by the Subordinate Judge namely, from the 5th of February, 1921, to the 5th of August 1921, and after that date, the court rate down to the date of sale or payment, a result which seems to do rough justice to both parties.

21. We, therefore, direct a preliminary decree for sale to be drawn up, and we give the plaintiffs six months from the date of this judgment for payment. In other respects the decree is to follow the usual provisions applicable to a decree for sale under Order XXXIV, Rule 4, of the Code of Civil Procedure. The appellants must have the costs of this appeal and of the proceedings in the court below.

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