Privy Council Appeal No. 6 of 1944

Madan Theatres, Limited - - - - - - *Appellants*

v.

Dinshaw & Co., Bankers, Limited (in liquidation) through the Official Liquidator - - - - *Respondents*

FROM

THE CHIEF COURT OF OUDH AT LUCKNOW

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH JULY, 1945

Present at the Hearing:

LORD PORTER
SIR MADHAVAN NAIR
SIR JOHN BEAUMONT

[*Delivered by* LORD PORTER]

This is an appeal from a judgment and decree of the Chief Court of Oudh at Lucknow dated the 17th March, 1942, which affirmed a judgment and decree of the Court of the Civil Judge at Lucknow dated the 23rd May, 1940.

The facts may be shortly stated.

On the 2nd July, 1931, the appellants executed a simple mortgage deed for Rs.1,50,000 in favour of the respondent bank. Some portion of this sum was paid off but on the 25th August, 1934, the bank instituted a mortgage suit against the appellants in the Court of the Subordinate Judge of Lucknow to recover Rs.78,542-1-3 by sale of the mortgaged property.

The bank also filed an application with the plaint praying for an attachment before judgment and the appointment of a receiver in respect of a portion of the hypothecated property and on the 11th September, 1934, the Court of the Civil Judge passed an order granting this application and appointing a receiver.

On the 18th September an agreement was entered into between the parties whereby the exploitation rights in four films were to be sold at Rs.12,500 each and the amounts to be credited to the appellants in part payment of the mortgage debt.

By clause 3 of that agreement the respondents were to credit to the mortgage account of the appellants the sum of Rs.12,500 for each film as soon as two prints of any of the four films should be delivered to the respondents and the respondents were to enter satisfaction in the decree in the Court to that extent immediately on getting delivery. Subsequently at a date not stated in the record the appellants sold to the respondents the exploitation rights in another film for Rs.17,500 for which Rs.10,000 was paid in cash and Rs.7,500 was to be credited to the mortgage debt, and later still it was agreed that the transfer of the rights in three out of the four original films should be cancelled and that the rights in a sixth film should be transferred in their place but at a price of Rs.75,000. These sums were to be in satisfaction of the mortgage debt and if there should be any excess in the hands of the respondents it was to be handed over to the appellants in cash.

On the 30th November, 1934, whilst these arrangements were being made a preliminary decree was passed in favour of the respondents against the appellants for a total sum of Rs.83,359-6-11 with future interest at 6 per cent. per annum from the 31st May, 1935.

The exact date when the agreements varying that of the 18th September, 1934, were made does not appear but from a statement made by the appellants in the Chief Court of Oudh, from the arguments and contentions presented before it and the way in which the matter is dealt with by the Court it would appear that they were entered into after the preliminary decree. In any case it is plain that the delivery of the first and second films took place after that date and the third still awaits delivery and has not yet been taken over by the respondents.

On the 15th October, 1935, the respondents went into liquidation and an official liquidator was appointed by the Court.

On the 29th September, 1937, the official liquidator filed an application for the passing of the final decree. The appellants resisted this application on the ground that the entire claim of the respondents had been satisfied by the agreements above mentioned and their fulfilment by putting the films referred to at the disposal of the respondents. In reply the liquidator did not admit knowledge of the agreement of the 18th September, maintained it was a nullity and unenforceable, and was made during the pendency of the suit and before the final decree was passed, that no payment of the amount due had been made in the manner set out in the preliminary decree, that the alleged payments or adjustments had not been certified as required under Order 21, Rule 2, of the Code of Civil Procedure, that as payment is denied no enquiry as to payment can now be made and, finally, that the alleged agreement with regard to the Rs.75,000 film was never entered into.

On these contentions the following issues were framed:—

1.—(*a*) Whether the opposite party can set up the agreement alleged to have been entered into between the parties before the passing of the preliminary decree as an adjustment of the decree?

(*b*) Whether the agreement was enforced after the passing of the preliminary decree? If so, its effect?

2. Whether an enquiry as to any payments made under the alleged agreement can be made in these proceedings?

3. Whether the alleged adjustment which has not been certified can be recognised by the Court?

Certain other issues dealing with an alleged transfer of the decree were also framed but are not material at this stage of the proceedings.

The trial of the application was stayed for a time after the issues were framed but came before the Court at a later date and was decided on the 23rd May, 1940, in favour of the respondents on the two grounds on which reliance was placed by the official liquidator, viz.: firstly, that there had been no payment as ordered in the preliminary decree and, secondly, that the agreement of the 18th September, 1934, being anterior to the date of the preliminary decree could not be enforced and set up in defence thereafter.

The preliminary decree declared the amount due up to the 30th May, 1935, to be Rs.83,359-6-11 in all, ordered that the appellants should pay that sum into Court on or before the 30th May, 1935, or any later date to which the Court might extend the time for payment with future interest at 6 per cent. per annum and further declared that in default of payment as aforesaid the respondents might apply for the sale of the mortgaged property.

The learned Judge held that inasmuch as that decree ordered payment into Court, nothing short of such payment would comply with the decree or be a protection to the appellants against a final order for sale. He accordingly made on the 23rd May, 1940, a final decree for sale of the mortgaged property. This decision would appear to be correct if the preliminary decree had been passed after an adjustment had been made and all the terms agreed upon by way of adjustment had been carried out before the making of the preliminary decree. In that case the mortgagor's remedy would be to appeal against the preliminary decree. For the reasons hereafter stated, however, the decision is wrong where the adjustment is made or carried out after the preliminary decree has been passed.

From this decree an appeal was taken to the Chief Court of Oudh but was dismissed upon the ground that the agreement of the 18th September, 1934, was made before and would not affect the preliminary decree and that once the preliminary decree was passed no future adjustments or payments by the mortgagor could be taken into account except possibly (1) sums admittedly paid, (2) sums paid in the presence of the Court, and (3) sums certified. It was held that except in such circumstances the appellants were not even entitled to put forward proof of any payments or adjustments alleged to have been made.

From this judgment the appellants have obtained leave to appeal and have appealed to His Majesty in Council, claiming the right to prove and, if proved, to take credit for the sums and adjustments upon which they rely.

Unfortunately the respondents were not represented on the hearing, but their Lordships have heard a full and careful discussion of the points at issue which apparently have given rise to a conflict of view between various Courts in India.

Prima facie a debtor should be entitled to take credit for any payments which he can prove to have made in respect of a mortgage debt. The only reason for prohibiting him from doing so would be that there was some valid law or regulation of the Court to the contrary.

Such regulations are however contended to exist and reliance is placed upon behalf of the respondents on Rules 2, 4 and 5 of Order 34 of the Code of Civil Procedure.

Rule 2 provides that in a suit for foreclosure, if the plaintiff succeeds the Court shall pass a preliminary decree directing that if the defendant pays into Court the sum due within the time fixed the plaintiff shall deliver up the documents of title and if necessary put the defendant in possession of the mortgaged property.

Rule 4 adapts the same procedure to the case of an application for sale and adds that in default of payment in accordance with the preliminary decree the plaintiff shall be entitled to apply for a final decree directing that the mortgaged property be sold.

Rule 5 (1) provides that where on or before the day fixed or at any time before the confirmation of a sale made in pursuance of a final decree passed under subrule (3) of this rule, the defendant makes payment into Court of the amounts due the Court shall pass a final decree or order providing for the delivery up of documents and if necessary retransfer of the property and that the defendant be put in possession.

Subrule (3) provides that where payment in accordance with subrule (1) has not been made the Court shall on application made by the plaintiff on that behalf pass a final decree directing that the mortgaged property be sold.

Rules 2 and 4 of this order, it was said, visualised and the preliminary decree made in this case directed payment into Court, and Rule 5 was mandatory in declaring that if that direction was not complied with the Court must pass a final decree for sale.

Admittedly no payment into Court had been made and therefore, it was contended, the Court was obliged to pass a final decree for sale.

It was at one time also contended that in any case any payment made in respect of the mortgage debt could not be relied upon unless certified under Order 21, Rule 2. But, apart from the question whether the parties could not compromise a decree (as to which see *Oudh Commercial Bank Ltd., Fyzabad* v. *Thakurain Bind Basni Kuer* (1939) L.R. 66 I.A. 84), it has again and again been held in India that this rule only applies in execution, that execution does not begin until after a final order for sale has been passed and that therefore the rule has no application when the question is whether or no a final decree for sale should be passed. Their Lordships agree with the Courts in India in this respect.

As regards the main argument their Lordships do not stop to consider the question whether the provisions of Rule 34 are, if they stood alone, sufficiently precise to prohibit the compromise of the preliminary decree in a

mortgage suit by payment or adjustment in some way other than that directed by the preliminary decree, since the question of adjustment is specifically dealt with in Order 23, Rule 3, which is as follows:—

> " Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded and shall pass a decree in accordance therewith so far as it relates to the suit ".

The appellants contend that this rule makes direct provision for the circumstances of the present case and say that so far from affirming the final decree the Chief Court should have recorded the satisfaction of the mortgage debt and passed a decree in accordance therewith provided it was proved to its satisfaction that the debt had been satisfied, and that to deny the appellants the opportunity of furnishing proof is to act in disregard of the express terms of the rule.

This question has given rise to a wide divergence of opinion in the Courts of India. The stricter interpretation which has been adopted by the Chief Court in this case is that the terms of Order 34, Rule 5, which have express reference to the making of a final decree in the case of an application for sale in a mortgage suit, override the terms of Order 23, Rule 3, which is of general but not of particular application. This view has the support of the Courts in Oudh and Lahore and at any rate in the earlier cases of the Courts of Madras. Their Lordships have been referred to (i) *Tirloki Nath Dube* v. *Sadhu Ram Tewari,* A.I.R. (1927) Oudh 275; (ii) *Sewa Ram* v. *Parbhu Dayal,* A.I.R. (1935) Oudh 313; (iii) *Mazbut Singh* v. *Mt. Indram,* A.I.R. (1936) Oudh 152; (iv) *Musammat Durga Devi* v. *Nand Lal,* A.I.R. (1932) Lahore 231; (v) *Piana Lal* v. *Bulagi Mal,* A.I.R. (1935) Lahore 168; (vi) *Raja Ram* v. *Allahabad Bank Ltd.,* A.I.R. (1939) Lahore 79, and (vii) *Singha Raja* v. *Pethu Raja* (1919) I.L.R. 42 Mad. 61.

One may summarize the decisions in these cases as determining that where the preliminary decree directs payment into Court no other method of payment is permissible: but that the harshness of this doctrine may be diminished in some three or four ways, i.e., (1) acceptance of money in satisfaction or part satisfaction, (2) acknowledgment of payment, (3) payment not into Court but in the presence of the presiding judge, (4) possibly the payment if certified.

Except in these cases the Court, it is said, cannot take notice of any payment out of Court. The fourth exception even if attention be paid only to the cases referred to above is not easy to accept since cases (i) and (iv) point out that Order 21 (2) applies only to cases where execution has begun and execution does not begin until the passing of the final decree. The other two exceptions seem to have been arrived at on no logical basis, but rather upon the injustice which would be perpetrated if they were not recognized.

The Courts of Allahabad and Patna appear to have taken a contrary view to those of Oudh and Lahore; the latest Madras case has cast some doubt on the earlier ones and Calcutta seems to take a similar view to that of Allahabad and Patna. Reference may be made to (*a*) *Inayat Khan* v. *Harbans Lal,* A.I.R. (1936) Allahabad 9; (*b*) *Munni Singh* v. *Collector of Benares,* A.I.R. (1939) Allahabad 28; (*c*) *Ram Niwas* v. *Ram Dayal,* A.I.R. (1939) Allahabad 174; (*d*) *Jogendra Prasad Narain Singh* v. *Gouri Shankar Prasad Sahu,* 2 Patna L.J. 533; (*e*) *Raja Bahadur Harihar Prasad Narain Singh* v. *Maharaj Kumar Gopal Saran Narain Singh* (1935) I.L.R. 14 Pat. 488; (*f*) *Palaniappa Chettiar* v. *Narayanan Chettiar* (1935) 69 Madras L.J. 765; and (*g*) *Piran Bibi* v. *Jitendra Mohun Mukerjee* (1917) Calc. W.N. 920.

It is true that the first of these cases leaves open the question whether a mere payment between preliminary and final decree without any adjustment would constitute a discharge of liability when it says, " Whatever be the correct view on the question whether money paid out of Court in

satisfaction of the decree in whole or part can be recognised by a Court when it is invoked to pass a final decree, it cannot refuse to act on Order 23 (3) if the conditions required are fulfilled ".

In that case the Court pointed out that there had been not a mere payment but an adjustment.

Even so limited an application of Order 23 (3) would suffice to establish the appellants' contention in the present case since adjustment followed by performance of the terms agreed is alleged.

The other cases however recognise that the suit continues up to final decree and consequently any adjustment or satisfaction up to that time must be taken into account.

A decree holder need not of course agree to any adjustment or accept payment otherwise than into Court but in their Lordships' opinion it is open to the debtor to allege and prove that an adjustment has taken place or payment in whole or in part has been made and received.

Indeed to hold otherwise is to disregard the opening words of the order, viz.: " Where it is proved to the satisfaction of the Court . . . ".

Their Lordships see no qualification to the wide terms of the order nor any grounds for limiting its application.

Admittedly the suit continues until the final decree is passed and there is no time limit for recording the agreement arrived at as there is under Order 21, Rule 2.

In the present case therefore the Judge of the Civil Court should have satisfied himself as to whether any adjustment had been arrived at or payment made, and followed this enquiry by an appropriate decree under which a finding of full satisfaction would lead to the dismissal of the suit and partial satisfaction to a diminution of the indebtedness whereas a finding that there had been no adjustment or satisfaction would be followed by a final decree for sale.

Their Lordships will accordingly humbly advise His Majesty that this appeal should be allowed, the final decree set aside and that the Subordinate Court should be directed to hear evidence and decide whether or not satisfaction wholly or in part has been made in respect of the mortgage debt and to pass a decree accordingly.

The respondents must pay the costs of the appellants before their Lordships and in the Courts in India.

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In the Privy Council

MADAN THEATRES, LIMITED

v.

DINSHAW & CO.

DELIVERED BY

LORD PORTER

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