CIVIL REVISION.

Before Costello A. C. J. and Ellis J.

MANINDRA MOHAN RAY TALUKDAR

v.

BIPIN BIHARI TALUKDAR.*

1937
Aug. 17, 19.

Agricultural Debt—Mortgage decree—Sale in execution and set-off—Satisfaction of decree in whole—Stay of proceedings—Notice of stay—Bengal Agricultural Debtors Act (Ben. VII of 1936), ss. 18, 34.

Where, in execution of a decree in a mortgage suit, a property is sold to the mortgagee for the sum due under the mortgage and a set-off is allowed, then the debt is extinguished even before the sale is confirmed and a notice under s. 34 of the Bengal Agricultural Debtors Act cannot be issued to stay further proceedings in a civil Court.

Nrishingha Charan Nandi Chaudhuri v. *Kedar Nath Chaudhuri* (1) followed.

The rights, surviving to the mortgagor after such set-off, under O. XXXIV, r. 5 of the Code of Civil Procedure do not have the effect of keeping alive the mortgage debt.

The proviso to s. 18 of the Act does not relate to a decree which has been wholly satisfied.

CIVIL RULE obtained by the decree-holder.

The facts of the case and arguments in the Rule are sufficiently set out in the judgment.

Shyama Prasanna Deb for the petitioner.

Birendra Kumar De and *Surendra Nath Basu (Jr.)* for the opposite party.

COSTELLO A. C. J. This is an application to set aside an order made by the Subordinate Judge of Mymensingh on May 31, 1937. The matter arose in connection with some execution-proceedings which had been taken for the purpose of enforcing a mortgage decree. It was pointed out by the learned Judge, in the course of the order now complained

*Civil Revision, No. 1064 of 1937, against the order of Binay Bhushan Sen, Third Subordinate Judge of Mymensingh, dated May 31, 1937.

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of, that the mortgaged property had been sold in execution of a mortgage decree. Thereupon the usual sort of application was made, namely, an application under O. XXI, r. 90 of the Code of Civil Procedure for the purpose of having the sale set aside. While the matter of that application was pending before the Court, a notice purporting to be a notice under s. 34 of the Bengal Agricultural Debtors Act of 1935 was sent to the Court presumably for the purpose of staying the proceedings then pending. The Court held that the case setting aside the sale, as the Judge puts it, could not be stayed. Subsequently, another notice purporting also to be a notice under s. 34 of the Act was received by the Court. That notice was designed to postpone confirmation of the sale which had already taken place. The learned Judge says :—

> After the dismissal of the case under O. XXI, r. 90 of the Code of Civil Procedure, the decree-holder (who is only the auction purchaser) filed a petition stating that, after the sale was held, s. 34 can have no application, inasmuch as there is now no debt in existence, so far as it has been satisfied by the sale of the property and, in support of that view, reference has been made to the direction No. 7 at the foot of Sch. A of the forms which are prescribed for use in connection with the administration of the Act.
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> .....
>
> .....
>
> It is stated there that in column 14 of this form, "stage reached" means "pending for sale", "property attached" and the like.

The learned Judge continues thus :—

> No doubt the directions support the view of the decree-holder. But so long as the sale is not confirmed, the execution-proceeding is pending before a civil Court. In that view of the case, I think, s. 34 has application.

He, accordingly, rejected the contentions put forward by the decree-holder and made an order : "pro-"ceeding be stayed". The question we have to decide is whether the learned Judge is right in ordering the proceedings to be stayed. This matter furnishes another example of the injustice which may be wrought to judgment-creditors unless, as we stated on a previous occasion, the Courts are very careful to see that no more latitude is given to the provisions of the Bengal Agricultural Debtors Act of

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1935 than the strictest interpretation of those provisions will justify. A bare recital of the history of the events which led up to the making of the order which is now challenged will serve to indicate how hard is the way of creditors seeking to recover monies justly due to them. I have stated that the present proceedings were in connection with a mortgage. That mortgage was entered into as long ago as August 4, 1918, very nearly twenty years ago. The suit out of which these proceedings have eventuated was started in the year 1933 by the present petitioner, who is the mortgagee. On August 30, 1934, there was a preliminary decree in that suit. Then on December 5, 1934, a final decree was made by the Subordinate Judge, Mymensingh. Some months later, namely, on April 1, 1935, the mortgagee instituted execution-proceedings which were described as Execution Case No. 76 of 1935 in the Court of the Third Subordinate Judge, Mymensingh. On June 4, 1935, a sale-proclamation was issued and two months later—rather, more than two months later—the mortgagors started proceedings which were described as a "Miscellaneous Case": those proceedings were brought under s. 47 of the Code of Civil Procedure. That case was dismissed on August 29, 1935, and thereupon an appeal was brought to this Court. While the appeal was still pending, namely, on September 3, 1935, a sale-proclamation was again issued. On October 30, 1935, the execution-proceedings were adjourned on the faith of an assurance given by the mortgagors that they were about to bring or were in a position to bring a "stay-order" from the High Court. That they did not do, but, on the contrary, the appeal which they had preferred was summarily dismissed. On November 25, 1935, the mortgaged properties were sold to the present petitioner for a sum of Rs. 11,000. There was an application for permission to have a set-off filed. On November 27, 1935, a poundage-fee was paid in the matter which then stood over until January 4, 1936, for confirmation of the sale. Before that date arrived, however, the

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decree-holder was again obstructed by the fact that a declaratory suit was started by one of the judgment-debtors in the Court of the fourth Subordinate Judge, Mymensingh, claiming a declaration that the mortgage-decree was not valid nor the sale which had been held in consequence of it and that both the decree and sale should be set aside. Actually, the judgment-debtor succeeded in obtaining a stay of the execution-proceedings, but that was not given effect to, because the sale had already taken place. Contemporaneously with the suit which I have just referred to, there were more Miscellaneous Cases started by the judgment-debtors under O. XXI, r. 90 of the Code of Civil Procedure for setting aside the sale. Upon that, the execution-proceedings were stayed. These Miscellaneous Cases (which were numbered 95 of 1935 and 1 of 1936) came on for hearing on March 14, 1936. The hearing lasted over a course of several days and eventually on April 2, 1935, the judgment-debtors were successful and the sale which had taken place many months before was set aside. Thereupon, on April 6, 1936, there was a fresh sale-proclamation and once again, on April 9, 1936, the judgment-debtors started another Miscellaneous Case, which was described as No. 22 of 1936 and was proceeding under s. 47 of the Code of Civil Procedure. A few days later, the execution proceedings were again stayed by reason of the institution of another so called Miscellaneous Case. On April 25, 1936, there was an application by the present petitioner—the judgment-creditor—requiring the other side to answer certain interrogatories. On the 2nd May, these persons applied for time to give answers to the interrogatories. Then on May 4, 1936, they refused to answer the interrogatories. On May 28, 1936, the whole matter was held up again because the sale was stayed by the Fourth Subordinate Judge, Mymensingh, pending the determination of the declaratory suit which had been started in December, 1936. On May 29, Miscellaneous Case No. 22 of 1936 was dismissed for want of prosecution.

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About a fortnight later, an intimation as to this was received from the Fourth Subordinate Judge and thereupon a sale proclamation was once more issued. On the 12th June, there was an order that the sale-proclamation was to contain a statement as to the value of the property and, accordingly, the execution-case was once more adjourned. On June 30, 1936, the declaratory suit was dismissed. There was an appeal against the order of dismissal and the appeal was subsequently dismissed. On the 8th July, the Fourth Subordinate Judge vacated the order of stay. Thereupon, once more a sale-proclamation was issued—on July 16, 1936—and that was to contain the value of the properties set out separately. On the 27th July, there was a stay order from the District Judge who was hearing the appeal in the declaratory suit. The execution-case was once more to be stayed—on August 10, 1936, on the appellant furnishing certain security. That security was duly furnished on the 21st August. Thereupon, the execution-case was stayed. On the 1st October, intimation was received that the District Judge had rescinded the stay order. Accordingly, the judgment-creditor was then in a position of being able to have had a date once more fixed for sale. The sale was fixed for October 5, 1936. But before the date of sale arrived, one of the judgment-debtors started another Miscellaneous Case on October 3, 1936, which is called Case No. 91 of 1936. That again was under s. 47 of the Code of Civil Procedure. The result of that was that the sale was once more adjourned from the 5th October to the 8th October pending the disposal of the Miscellaneous Case. That case was dismissed on the 8th October. The execution proceedings were continued, the bidding sheet was handed over to the *nâzir*. The judgment-creditor, the mortgagee, obtained permission to bid. A prayer which was put forward by the other side for a stay order was refused and at long last the properties were once more sold to the decree-holder, the mortgagee, and on this occasion for the sum of Rs. 19,177-8 which was the exact amount of the

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sum of money then due to the decree-holder. He, accordingly, put in a petition, asking to be allowed to set-off the purchase-price as against the judgment-debt stating that the debt had been fully "wiped off" by the sale and nothing more was due to him from the judgment-debtor. The prayer for set-off was allowed. That, of course, must have been done under the provisions of O. XXI, r. 72, sub-r. (*2*) which says :—

> "Where a decree-holder purchases with such permission" (that is to say, the permission of the Court) "the purchase-money and the amount due on "the decree may, subject to the provisions of s. 73, be set-off against one "another, and the Court executing the decree shall enter up satisfaction of "the decree in whole or in part accordingly."

In the present instance, as I have already stated, the amount of the purchase-money was exactly equal to that of the debt due under the decree. Therefore, it was a case, for entering up satisfaction in whole and not merely in part. This unfortunately was not the end of the matter. On the 19th October, the poundage-fee was paid. The matter was postponed until November 19, 1936, for confirmation of the sale. Before that date arrived, however, one of the judgment-debtors, exhibiting once more the dishonest persistence or rather the persistence in dishonesty which he had displayed throughout, started a Miscellaneous Case. That is called No. 100 of 1936. That again was under O. 21, r. 90 of the Code of Civil Procedure. The effect of that device was that confirmation of the sale, which ought to have taken place on November 19, 1936, was postponed until the disposal of the Miscellaneous Case. Then comes the intervention of the extraneous authority—which has given rise to the present difficulties of the judgment-creditor. In the month of February, 1937, Debt Settlement Boards were set up under the provisions of the Bengal Agricultural Debtors Act of 1935, which under the provisions of s. 3 of the Act had been put into operation in the district of Mymensingh in the previous July. On April 3, 1937, a notice purporting to be a notice under s. 34 of the Act was received by the Court, as pointed out in the judgment of the

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learned Judge, for staying of the Miscellaneous Case No. 100 of 1936. It is not apparent from the judgment, nor have we before us any information to show whether in the notice itself reference was made to that particular proceeding. If there was a reference of that kind, it might well have been argued that the notice contained something which was not authorised by the provisions of the Act or by the rules made under the Act and so was a bad notice. The learned Judge took the view, as I have already indicated, that, at any rate, it could not have the effect of staying the Miscellaneous Case and indeed that would seem to be a reasonable view, because presumably the debtor had been the applicant before the Debt Settlement Board and the Miscellaneous Case was one institued by him and not by his creditor. The learned Judge refused to stay the Miscellaneous Case on April 17, 1937, and fixed the date for hearing of that case as on April 24, 1937. On that date, the debtor took no steps. The case was adjourned until May 5, 1937, for peremptory hearing. It becomes clear why the judgment-debtor took no steps on the 24th April when we find that on the 30th April there came a fresh notice from the Debt Settlement Board requiring the stay of the execution-case itself. Presumably, the first notice might have been sent, or at any rate the terms of it might have been stated, owing to some misunderstanding on the part of the Board as to what the Miscellaneous Case was about or what the execution-case was about. That we do not know. On the 5th May, the Miscellaneous Case was taken up for hearing. Both parties were there and they filed *hâjirâ*. The debtor, it seems, again prayed for further time and made an application for an adjournment in order to enable him to put in an application in revision to the High Court. That application for time was properly rejected by the learned Judge. On the 17th May, the Miscellaneous Case was dismissed. The execution-case then started once more on its way. It was adjourned

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until the 25th May in order that the learned Judge might consider the effect of the second notice under s. 34 of the Bengal Agricultural Debtors Act, which had been received on April 30, 1937. On the 25th May, the present petitioner, that is to say, the judgment-creditor put in objection to the stay and those are the objections referred to in the judgment of the learned Judge to which I have already made reference. Then on May 31, 1937, came the stay-order which is the order now objected to. I have recited the catalogue of dates and referred in some detail to the history of the matter in order to show how possible and easy it is under the general law for a dishonest debtor, even if he be a judgment-debtor, to evade his just obligations and to avoid discharging the debt which he undoubtedly owes, but now, a further weapon has been placed in the hands of dishonest debtors in the shape of the intervention of Debt Settlement Boards. The learned Judge thought that he was under an obligation to stay the execution-proceedings and, if the learned Judge is right, once more and perhaps for all time and irrevocably, the judgment-creditor would be baulked of his just dues. But is the learned Judge right? The operation of a Debt Settlement Board pre-supposes firstly that there is a person who can properly describe himself as a debtor within the meaning of the Bengal Agricultural Debtors Act of 1936 and the existence of a debt. There is a proviso to s. 18 of the Act which says :—

> Provided that a decree of a civil Court relating to a debt shall be conclusive evidence as to the existence and amount of the debt as between the parties to the decree.

But we must give that a reasonable interpretation. We were invited by the learned advocates appearing in this case to assume that this Act was drafted and passed by persons of intelligence. Upon that assumption, we cannot but come to the conclusion that the proviso must have been intended to relate only to decrees which are unsatisfied and not to decrees which have ceased to have effect, because

there has been, to use the words of O. XXI, r. 72, sub-r. (*2*), "satisfaction of the decree in whole."

An examination of the relevant dates in this matter shows that on October 8, 1936, the mortgaged properties had been sold to the decree-holder, the mortgagee, for the exact amount of the debt then due and owing to him and that he was allowed to set-off the amount of the price (which he otherwise would have paid for the property) as against the amount of the debt due to him from the owners of those properties, that is to say, the judgment-debtors. In these circumstances, we cannot do otherwise than come to the conclusion that the "satisfaction of the "debt in whole" thereby entailed had the effect as the decree-holder himself admitted of obliterating and putting an end altogether to the debt which had existed up to that time. In that view of the matter, this case falls precisely within the ambit of the decision which we gave in an analogous matter on the 21st July this year in *Nrishingha Charan Nandi Chaudhuri* v. *Kedar Nath Chaudhuri* (1). If there was no debt, the Debt Settlement Board had no right to interfere with the proceedings in the Court of the Subordinate Judge, Mymensingh.

It has been argued and argued very ably and forcibly by Mr. De on behalf of the opposite party in these proceedings that we ought not to hold that the debt had been extinguished because the debt in the present instance was due under a mortgage and the mortgagors have certain rights which are conferred upon them by O. XXXIV, r. 5 of the Code of Civil Procedure,—rights in the way of being entitled under certain conditions to get back property which has been sold for the purpose of satisfying the mortgage decree. We have listened very carefully and have given our best consideration to the arguments put forward by Mr. De, but we are clearly of opinion

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that the rights possessed by a mortgagor of the kind, I have indicated, do not bring it about that the set-off which was allowed at the time of the sale would fail to have the effect of extinguishing the mortgage-debt. The position, in our opinion, is this that the set-off did extinguish the debt and that what is given to the mortgagor judgment-debtor is merely a right to get back the properties on making certain payments. Making of those payments, even if the debtor chose to avail himself of the rights conferred on him by O. XXXIV, r. 5. would not have the effect of resuscitating or bringing to life again the debt which was already dead. In the circumstances, we find ourselves able to say—fortunately for the mortgagee decree-holder,—that the learned Judge was wrong in staying the execution-proceedings.

I would point out, however, that the dividing line between the set of facts and circumstances which enable a judgment-creditor to survive this kind of onslaught on the part of a dishonest judgment-debtor is a very narrow one. It is only the fortuitous circumstances that the set-off was allowed and that the purchase price exactly equalled the amount of the debt that enables us to say in this case that there was, at the time when the notice under s. 34 of the Act was issued, no debt.

The Rule is made absolute with costs, hearing fee two gold mohurs. The order of the learned Judge is set aside and we direct that the execution-proceedings do proceed with the utmost despatch.

EDGLEY J. I agree.

Rule absolute.

G. K. D.