
(1919) 05 CAL CK 0035
In the Calcutta High Court

Annoda Charan Mondal

APPELLANT

Vs

Atul Chandra Malik and Others

RESPONDENT

Date of Decision : 12-05-1919

Acts Referred:

Citation : 54 Ind. Cas. 197

Hon'ble Judges : Cuming, J; Asutosh Chaudhuri, J

Bench : Division Bench

Judgement

1. The plaintiffs instituted the suit for a declaration that they were the reversioners of the estate of one Gopal Chandra Shaw,- their maternal uncle, that a mortgage which had been executed by his widow Mokhadamoyee Dassi was not operative against them and that the properties covered thereby could not be sold in execution of the decree obtained by the mortgagee against her. They also applied for a temporary injunction restraining the sale and for a declaration that they were not affected by the mortgage deed or the decree or by the sale of the mortgaged properties as directed by the said decree. It appears that the plaint was subsequently amended and an allegation was added that the mortgage-debt had been satisfied. It was also alleged by them that the lady had no legal necessity and, therefore, could not bind the estate in any manner. It is noticeable that there is nothing said in the plaint about this lady having obtained Letters of Administration to the estate of her husband. It is clear upon the evidence that citations were issued so far as the reversionary heirs were concerned and that some of them were present when the Letters were granted. There is no question that the plaintiffs are the present reversionary heirs of Gopal Chandra Shaw.

2. The learned Subordinate Judge held that there was legal necessity for the loan contracted by the widow Mokhadamoyee, that she applied for leave to mortgage the property after having obtained Letters of Administration and such leave was granted by the Court, that the reversioners, at least some of them, had knowledge of the application but did nothing. He held upon these facts that the

plaintiffs "had knowledge of the legal necessity." As regards the allegation that the mortgage-debt due to the decree-holders had been satisfied, he found that the documents relied upon by the plaintiffs were not genuine, that the mortgage bond "had not been paid in part and not been satisfied from the income of the land in the mortgage suit," and, therefore, it stood good and valid. He, therefore, dismissed the suit.

3. On appeal the learned Additional District Judge has reversed that decision upon the following findings: (1) that the mortgage in question was not for legal necessity : and (2) that the defendant No. 2, the mortgagee, did not by bona fide enquiry satisfy himself that there was such necessity. It appears to us that he has entirely overlooked the question about this lady having obtained sanction of the Probate Court to mortgage the property. After such sanction the defendant No. 2 advanced money, presumably relying upon the fiat of the Court. There is nothing to show, nor has it been found, that the transaction was collusive or fraudulent or that there was anything which tainted the transaction with fraud. It was not a case of advancing money having regard to the legal necessity of a Hindu widow, but merely upon leave granted by the Court which permitted her to mortgage the property. It is incorrect to suppose that having regard to the sanction given by a Probate Court a person had still to enquire as regards the necessity for such advance. If he bona fide relied upon the order and made the advance, there is no onus upon him to go and make enquiries about the truth of the allegation upon which the sanction was given. To challenge such a transaction it has to be shown that the person who got the mortgage knew that the facts were false or that he was instrumental in getting the order from the Court upon false representation. The learned Judge has, however, elaborately gone into the question of legal necessity and he has gone to the extent that even the earlier mortgage transaction in which this estate was concerned was not a good mortgage, and he has not considered the case from the point of view we have above mentioned. We call his attention to *Kamikhaya Nath Mukerjee v. Hari Churn Sen* 26 C. 607.

4. Then as regards the question of payment of the mortgage-debt, he says this : The accounts show that Mokhada paid off the money due to Annoda, the mortgagee. He says the learned Subordinate Judge had not sufficient grounds for finding that the documents relied upon by the other side were fabrications. He doubted if there were sufficient grounds. Dealing with the accounts Exhibit 11 and an abstract of that account Exhibit 5 which purports to have been signed by the mortgagee, he says, there is no express denial of the signature by Annoda the mortgagee but that Annoda merely denied that he made the endorsement. He says that it is alleged that Annoda was looking after the property of the widow and adds: "Taking it that he was looking after the property I must say I think there is quite sufficient evidence for holding this--and it was his business to see that proper accounts were submitted and the occurrence of such an endorsement is most natural." Then he refers to the security bond which was given by Annoda and three of his relatives in respect of the Letters of

Administration, and refers to the fact that they were to see that the estate was properly administered and accounts submitted and that the accounts would in the natural course be placed before Annoda. He does not definitely find that the account Exhibit 5 was signed by Annoda. He stops short of coming to such a finding : although the tendency of his mind was in that direction, he does not say so. He evidently did not feel justified in saying so. It is the same sort of equivocal finding about the letter and the postcard. He flays that he doubts if there is sufficient ground for the Subordinate Judge's finding that they were fabrications. Having regard to the serious nature of the allegations and also having regard to the considered judgment of the Subordinate Judge, it was only right and proper that he should also definitely and clearly state his views. This is a very important point in the case, but he has not dealt with it from the proper point of view.

5. So far as the mortgage-deed is concern-ed, the suit was instituted by the mortgagee, a decree was obtained thereupon and now there is an appeal pending against that decree. The question as to whether the mortgage-deed has been paid off or not is the subject-matter for determination in that suit and if the plaintiffs knew of that suit, it was right and proper for them to ask to be added as parties so far as that suit was concerned. In the suit as framed it was not suggested that Mokhadamoyee had fraudulently suppressed the fact or that she had colluded with the mortgagee in obtaining that mortgage decree. Allegations of fraud have got to be particularized in the plaint. We do not find -any such allegation here. What the precise nature of the fraud is has not been stated, nor what part was taken by either Mokhadamoyee or the mortgagee in respect of that transaction. If they want to make a case of fraud which they have not made, it may be open to them to pursue their remedies hereafter. But so far as the present suit is concerned, we do not think that any fraud has been alleged and we cannot, therefore, deal with the matter in the manner it has been done by the Appellate Court.

6. It has been strenuously argued before us that the Letters of Administration were obtained by Mokhadamoyee without making any allegation that anything remained to be administered in the estate, that the order was improperly made and upon insufficient materials and the sanction to borrow was also not properly granted. The Letters of Administration, however, have not been withdrawn and the Civil Court has no jurisdiction to declare the order as null and void. The proper Court to set aside the Letters of Administration is the Probate Court. We think also that it was exceedingly improper on the part of the plaintiffs not to mention anything about the Letters of Administration in their plaint. They should not have suppressed that fact. We think it was deliberately done, inasmuch as they felt it was a serious difficulty in their way.

7. In the result we are of opinion that the findings upon which the learned Judge reversed the decision of the Subordinate Judge are not satisfactory and we think that he has not arrived at a wrong decision in the matter, which we now reverse. The appeal is allowed and the plaintiffs' suit is dismissed with costs in all the

Courts.