

(1951) 09 CAL CK 0019
In the Calcutta High Court
Case No : A.F.O.D. No. 327 of 1944

Birendra Nath Banerjee and Others

APPELLANT

Vs

Shibaram Aditya and Others

RESPONDENT

Date of Decision : 03-09-1951

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 3, Order 41 Rule 2, Order 45 Rule 13, 21

Limitation Act, 1908 — Article 125, 142, 144

Probate and Administration (Amendment) Act, 1925 — Article 39, 157, 50

Citation : AIR 1952 Cal 473

Hon'ble Judges : R.P. Mookerjee, J; Lahiri, J

Bench : Division Bench

Advocate : Bireswar Chatterjee, Subodh Chandra Basak and Gouri Prosad Mookerjee, for the Appellant; Atul Chandra Gupta and S.N. Basu Sr. for Nos. 1(a) and 1(b), Ranjit Kr. Banerji, for No. 1(a), Nalini Ranjan Bhattacharji and Dhanesh Chandra Mitra for 2, P.N. Mitra and Hemanta Krishna Mitra for 3 and 4, (Cross Objectors) S.N. Basu Sr., for 5 and Jitendra Nath Ghosh, for 6, for the Respondent

Final Decision : Dismissed

Judgement

Lahiri, J.—This appeal by the plaintiffs arises out of a suit for a declaration that the plaintiffs are the reversionary heirs of their maternal grandfather, Surendra Nath Mookerjee (deceased) and that their mother Avista Karini Debi (Defendant No. 8) had "only the limited interest of a Hindu daughter in the properties left by Surendra Nath Mookerjee and described in Schedule Ka of the plaint and as such the auction-sale held at the instance of defendant No. 1 against defendant No. 8 in respect of one of the properties and certain other alienations made by defendant No. 8 in favour of defendants 2 to 7 in respect of other properties are not binding on the plaintiffs.

2. The plaintiffs' case is that their maternal grandfather, Surendra Nath Mookerjee died on the 23rd January 1910 (corresponding to the 12th Magh 1316) leaving a widow named Rakhal Dasi and a daughter named Avistakarini by

another wife. Avistakarini had five sons named Ramendra, Khagendra, Birendrat Nirendra and Debendra. Of these five sons the suit was originally instituted by the last four and Ramendra was impleaded as pro forma defendant No. 9. Subsequently Rameiidra was transposed to the category of the plaintiffs. Shortly after the death of Surendra Nath, Avistakarini (defendant No. 8) applied for letters of administration with a copy of the Will alleged to have been executed by Surendra. Rakhal Dasi filed objections to the grant; but the Additional District Judge who tried the suit made an order for the issue of the Letters of Administration. Against that order Rakhal Dasi filed an appeal to the High Court which was registered as Appeal from Original Decree No. 175/19.12. The High Court allowed the appeal and set aside the order for the issue of Letters of Administration. Against the decision of the High Court Avistakarini filed an application for leave to appeal to Privy Council which was registered as Privy Council Appeal No. 145/1914. This, appeal to Privy Council was not proceeded with and eventually allowed to be withdrawn on 14-12-1915. The plaintiffs claim that as a result of the dismissal of Avistakarini's application for Letters of Administration and the withdrawal of the appeal to the Privy Council it was established that Surendra Nath Mookerjee had died intestate and Rakhal Dasi, the widow and Avistakarini, the daughter, had only life interests in the properties left by Surendra Nath Mookerjee. Rakhal Dasi, the widow died in Falgoun, 1334, corresponding to February-March 1928. Although Avistakarini had only a life interest in the properties left by her father she entered into various collusive transactions with the different defendants on the footing that she was the absolute owner, without any justifying legal necessity. These transactions, according to the plaintiffs are not binding on the plaintiffs as the reversionary heirs of Surendra Nath. The transactions that impeached by the plaintiffs are: (a) a mortgage in favour of defendant No. 1 (Doman Aditya) which was followed by a decree and an auction-sale (b) a mortgage in favour of Defendant No. 2 (Nripendra Nath Bose) (c) a mortgage in favour of Defendants Nos. 3 and 4 (Sailendra Krishna and Jiban Krishna Kundu Choudhury) (d) A lease for twenty years in favour of Defendant No. 5 (Nayan Chandra Datta) (e) a permanent lease in favour of Defendants Nos. 6 and 7 (Bachulal Saha and Jagannath Saha). The plaintiffs prayed that the auction-purchase by defendant No. 1 and the mortgages and leases executed by defendant No. 8 (Avistakarini) in favour of defendants 2 to 7 are not binding against the plaintiffs and the reversionary rights of the plaintiffs are not in any way affected thereby.

3. The suit was contested by five sets of written statements. The defendant No. 1 died after filing his written statement and his heirs defendants Nos. 1(a) and 1(b) adopted the written statement filed by him. The defence of defendants 1, 2, 3, 4, 6 and 7 is that the suit is barred by limitation, estoppel and waiver, that Avistakarini had an absolute interest in the estate of her father, because after the decision of the High Court in Appeal from Original Decree No. 175/1912 there was a compromise between Avistakarini and Rakhal Dasi as a result of which Rakhal Dasi withdrew her objections to the Probate case and Avistakarini got an

absolute title to the estate of her father; that thereafter Avistakarini continued in possession as an absolute owner adversely to Rakhal Dasi and her title to the estate was perfected by adverse possession, they further pleaded that even assuming that Avistakarini was a limited owner the transactions were binding upon the plaintiffs because they were entered into for the benefit of the estate and for justifying legal necessity. The defence of defendant No. 5 was that Avistakarini was the absolute owner of the properties left by her father and that he was a bona fide lessee in respect of one of the properties.

4. The learned Subordinate Judge who tried the suit dismissed it upon the finding that Avistakarini acquired an absolute interest by the compromise with Rakhal Dasi which was binding upon the reversionary as a family arrangement, he has also found that Avistakarini acquired an absolute title by adverse possession. With regard to the mortgage in favour of defendant No. 1 he has also found that the plaintiffs' claim is barred by limitation. As regards the mortgages in favour of defendants 1, 2, 3 and 4 and the leases in favour of defendants 5, 6 and 7, he has found that these transactions were not entered into for legal necessity with regard to the lease in favour of defendant No. 5 he found that though it was not for legal necessity it was binding upon the plaintiffs as it was granted in the course of ordinary management of the estate. He has further found that the mortgage in favour of defendant No. 2, though not executed for legal necessity was nevertheless binding upon the plaintiffs Nos. 2, 3 and 5, i.e. Birendra, Nirendra and Ramendra inasmuch as they were consenting parties to the transaction.

5. Against the aforesaid decision the plaintiffs have filed this appeal and on their behalf it has been argued that the decision of the Subordinate Judge that Avistakarini acquired an absolute interest by the compromise in the High Court is wrong. The Will, alleged to have been executed by Surendra Nath Mukherjee is Ex. M(I). By this document Surendra Nath purported to bequeath all his movable and immovable properties to his daughter Avistakarini subject to the payment of expenses for religious ceremonies & pilgrimages to his widow Rakhal Dasi. Avistakarini obtained Letters of Administration with a copy of this Will from the Court of the Additional District Judge, 24-Parganas and against that decision Rakhal Dasi filed an appeal to this Court Ex. 2, the judgment of this Court in Rakhal Dasi's appeal shows that on 12-6-1914 this Court reversed the decision of the Additional District Judge on the ground that the evidence adduced by the propounded did not establish the genuineness of the Will. Against this decision Avistakarini filed an appln. for leave to appeal to the Privy Council & this was registered as P. C. A. 145/1914 and the application was finally admitted on 7-6-1915. On 3-12-1915 during the pendency of the said application for leave to appeal to Privy Council Rakhal Dasi executed a deed of release in favour of Avistakarini. This document is Ex. Section By its terms Rakhal Dasi relinquished all her claims and interest to the properties left by her deceased husband in favour of Avistakarini and her heirs and representatives upon the latter's agreeing to pay a monthly allowance of Rs. 50/- for the maintenance of Rakhal Dasi and a further amount of Rs. 6800/- for the expenses of religious ceremonies

and pilgrimage. The acknowledgment of receipt of the sum of Rs. 6800/- is recited in the document and the monthly allowance of Rs. 50/- is made a charge on certain properties enumerated therein. This document further provides for the residence of Rakhal Dasi in certain rooms of the family dwelling house. On the same date, i.e. 3-12-1915 Avistakarini executed an ekrarnama Ex. T. in favour of Rakhal Dasi on the same terms and conditions as Ex. Section Finally on 5-12-1915 Rakhal Dasi and Ayistakarini jointly filed a petition of compromise in the High Court in P. C. A, 145/1914. This petition is Ex. 5. It recites that Rakhal Dasi was withdrawing her objections to the Will of Surendra Nath Mukherjee and was giving her full consent to the grant of letters of administration with a copy of the Will annexed to Avistakarini subject to the provisions about maintenance allowance, residence and payment of the lump sum of Rs. 6800/- as embodied in Exs. S & T. Upon this petition the High Court passed the following order on 14-12-1915 as will appear from Ex. 4.

"The parties having compromised this matter and the appeal having been finally admitted the only course appears to be to allow the appeal to be withdrawn without costs."

6. It should be noticed that in the petition Ex. 5 the parties made a prayer that the order of the Court below granting letters of administration to Avistakarini might be confirmed or if the Court was of the opinion that that order could not be made, the appeal might be allowed to be withdrawn. The order of the High Court was communicated to the Court below over the signature of the Deputy Registrar by Ex. J3.

7. The learned Subordinate Judge at one place of his judgment has held that as a result of the order, Ex. 4, the High Court must be deemed to have accepted the compromise and as a result of that acceptance the decision of the High Court in Appeal from Original decree No. 175/1912 lost its force. This view however, cannot be accepted as correct. As we read the order Ex. 4, the operative portion merely allows the petitioners to withdraw the appeal to Privy Council and the result of withdrawal of the appeal is to allow the judgment Of the High Court in Appeal No. 175/12 to stand. Moreover, the High Court, in its Privy Council department had no jurisdiction to alter or vary the decree passed in Appeal No. 175/12. That could be done only by the Judicial Committee on application made before the Board. Further whether probate to a Will is to be granted or not cannot be decided by the parties by consent, without" an independent judgment on the issues by this Court. At another place of the judgment the Subordinate Judge seems to have realised this difficulty and came to the conclusion " that the compromise did not validate the grant which had been rendered invalid by the judgment in Appeal No. 175/12."

8. The learned Subordinate Judge has further held that the letters of administration which were issued in favour of Avistakarini during the pendency of Appeal No. 175/12 were never recalled and were allowed to remain in her hands and this fact goes to show that the compromise was accepted by the High Court.

This conclusion also does not appear to be correct. The grant of letters made in favour of Avistakarini lost its validity after the judgment of the High Court in Appeal No. 175/12 and the non-recalling of the grant did not confer any right on her. Mr. Pramatha Nath Mitter appearing for defendants Nos. 3 and 4 strenuously argued that on account of the fact that the Letters of Administration which were actually issued in favour of Avistakarini had not been recalled after the judgment of the High Court establishes Avistakarini's representative title to the estate of her father. In other words, the grant retained its validity although by its judgment in Appeal No. 175/19.12 the High Court had vacated the order of the lower Court issuing the grant. Mr. Mitter relied upon the decision in "SAILAJA PROSAD v. JADUNATH", 19 Cal W N 240. The facts of that case are, however, quite different from the facts of the case before us. In "SAILAJA PROSAD'S" CASE" letters of administration were issued in favour of certain persons and during the pendency of an appeal against the grant the administrators with the permission of the District Judge mortgaged certain properties to pay off a debt which was binding on the estate as a result of the appeal the grant was subsequently revoked and it was held that the revocation of the grant did not affect the title of the mortgagee. In the course of his judgment Mookerjee J. observed as follows:

"Where, however, the act in question is one which the administrator is not compellable to do, but is a voluntary act on his part, it has sometimes been said that it is simply void, and no title is thereby conferred on a purchaser or a mortgagee."

In the case before us, the mortgages were executed long after the Judgment of the appellate Court and moreover they were voluntary acts and were not executed with the permission of the District Judge. It is also to be noticed that in Sailaja Prasad's case reliance was placed upon the decision of the Privy Council in the case of "DEBENDRANATH v. ADMINISTRATOR GENERAL BENGAL", 35 Ind App 109 (P C) for the proposition that a view more favourable to the rights of the bona fide transferee for value without notice has been taken in more recent decisions. In the case of the mortgage in favour of Defendants 3 and 4 for whom Mr. Mitter appears there can be no question that the mortgagees had full notice of the fact that the order issuing letters of administration to Avistakarini had been vacated by the High Court on appeal. Gouri Sankar Mukherjee Solicitor who has been examined by defendants 3 and 4 as D.W. 14 has admitted in his evidence that in the course of his search of the testamentary case he came to know about the order of the High Court vacating the order of grant of letters of administration and also about the compromise in the application for leave to Privy Council.

9. Mr. Mitter has also relied upon Section 157 of the Probate and Administration Act for the proposition that when a grant is revoked or annulled the grantee shall deliver up the grant to Court for cancellation. In our opinion this provision applies to a case where the grant is revoked or annulled u/s 50 of the Probate and

Administration Act and not to a case where the order of issue of grant is vacated on appeal. Ordinarily the effect of the reversal of a judgment on appeal is as if judgment of the first Court had not been pronounced at all; but this is subject to the exception pointed out in "SAILAJA PRASAD'S CASE", (19 Cal W N 240), which is to the effect that the grant remains operative for the limited purpose of protecting bona fide transferees for value without notice during the pendency of the appeal. The contention of Mr. Mitter that Avistakarjni had absolute title to the estate of her father because the letters of administration issued in her favour were not actually recalled after the judgment of the High Court in Appeal No. 175/ 1912, must therefore be overruled.

10. The question, however, that requires consideration is whether the three documents Exs. S, T and 5 constitute a family arrangement that binds the reversioners. There can be no doubt that the three documents constitute parts of one transaction and were executed for the purpose of effecting a compromise in a contentious litigation. Mr. Gupta appearing for the heirs of defendant No. 1 argued" that the compromise stands or falls on its own merits and that the presence or absence of an order of the. Court does not add to or detract from the legal effect of the compromise. According to Mr. Gupta the compromise was entered into for the bona fide settlement of a family dispute & was for the benefit of the estate & it is .therefore binding on the reversioners. The judgment of the High Court was pronounced on 12-6-1914 & Avistakarini"s application for leave to appeal to Privy Council was finally admitted on 7-6-1915. After the final admission of the application for leave to appeal to Privy Council the finality of the judgment of the High Court in. Appeal No. 175/1912 had been imperilled. In these circumstances Rakhal dasi who represented the estate of Surendranath Mookerjee entered into the compromise on the footing. that Avistakarini had her rights under the will subject to the reservations in favour of Rakhal dasi herself. The appeal to Privy Council filed by Avistakarini might or might not be successful. So the compromise was of doubtful claims. There is no suggestion that the compromise was not bona fide or that it was for the personal advantage of Rakhal dasi. The estate was also benefited in the sense that it was saved from the costs of appeal to the Privy Council. By" the compromise Avistakarini was declared as having an absolute interest in the estate of her father. This absolute title was of the same nature as was given to her under the Will which had not been probated by this Court. This absolute title is therefore not dependant upon the Will but upon the family settlement as evidenced by Exs. S, T and 5. For these reasons it seems to us that the compromise was binding upon the reversioners. We are fortified in this view by the decisions of the Privy Council in the cases of "KHUNNILAL v. GOVINDA KRISHNA", 38 Ind App 87 (P C); "HIRAN BIBI v. SOHAN BIBI", 18 Cal W N 929 (PC) and "RAMSUMRAN v. SHYAM KUMART, 49 Ind App 342 (PC) and also by the decision of this Court in "UPENDRANATH v. GURUPADA", 34 Cal W N 404 and "MOHENDRANATH v. SHAMASUNNESSA" 21 Cal L J 157 which was approved by the Privy Council in "RAMSUMRAN"S CASE".

11. Mr. Chatterjee appearing for the appellants strongly relied upon the case of "SARODA KANTA v. GOBINDA MOHAN" 12 Cal L J 91 for the proposition that the compromise entered into in the present case was not legal. That case lays down the proposition that when a probate has been revoked on the ground that a Will is a forgery it is not open to the parties to bring up the matter on appeal and obtain a revival of probate by compromise without adjudication. In the case before us although there was a prayer in the petition of compromise (Ex. 5) that the Letters of Administration granted by the District Court may be confirmed no order was made in terms of that prayer and the parties adjusted their rights by altering the terms of the Will by agreement. We accordingly hold that the compromise arrived at in the present case is not hit by the decision in "SARODA KANTA'S CASE". By the compromise a charge was created on certain properties for the maintenance allowance of Rakhal dasi and Rakhal dasi was recognising the absolute right of Avistakarjni in her father's estate. To use the language of "RANI MEWA KUNWAR v. RANI HULAS KUNWAR", (1 Ind App 157 P C) which was quoted with approval in "KHUNNILA'S CASE", at p. 103 of 38 Ind App 87 the compromise is "based on the assumption that there was an antecedent title of some kind in the parties and the agreement acknowledges and defines what that title is." We accordingly hold that the plaintiffs are bound by the compromise between Rakhal Dasi and Avistakarini.

12. The learned Subordinate Judge has further held that Avistakarini acquired an indefeasible title to the estate of her father as an absolute owner by adverse possession for more than twelve years. The reasons given for this conclusion are that Avistakarini continued to be in possession as an absolute owner since the date of compromise and her possession was adverse against Rakhaldasi and the adverse possession for more than 12 years which barred the rights of Rakhaldasi will also bar the plaintiffs. The Subordinate Judge has relied on the decision of the Judicial Committee in "MT. JAGGO BAI v. UTSVALAL" 33 Cal W N 809 (P C) in this connection. In our opinion this conclusion of the Subordinate Judge is not correct. "MT. JAGGO BAI'S CASE", lays down the principles under which adverse possession by a third party, against a widow will bar the reversioners' rights. It does not say anything about the circumstances under which a widow may prescribe against reversioners. The reversioners' right to possession arises only after the death of the limited owner. So it is impossible to hold that a limited owner like Avistakarini, could in the circumstances of the present case, acquire an indefeasible title by adverse possession against the plaintiffs. The finding of the Subordinate Judge on the question of adverse possession must accordingly be set aside.

13. As a result of the aforesaid discussion we affirm the decision of the Court below to the effect that the compromise arrived at between Rakhaldasi and Avistakarini binds the reversioners but we set aside the decision of the Court below that the compromise was approved by the High Court and that Avistakarini acquired an absolute right by the non-recalling of the grant and that Avistakarini acquired an absolute right by adverse possession.

14. After having disposed of the above points which are common to all the defendants it remains for us to consider the case in respect of each individual transaction.

15. (a) "Mortgage in favour of defendant No. 1 (Doman Aditya)" From the materials on the record it appears that Avistakarini borrowed a sum of Rs. 12,000/- from one Balai Chatterjee on 3-9-1920 by mortgaging premises No. 17, Gopal Lal Tagore Road which is item No. 2 of schedule (Ka) of the plaint. This mortgage bond is Ex. K. Balai obtained a decree on this mortgage and put up the mortgaged property to sale for a sum of Rs. 17,730/-. On 18-8-24 Balai's decree was satisfied - vide Ex. J. and on 17-8-24 Avistakarini borrowed a sum of Rs. 20,000/- from defendant No. 1 (Doman Aditya) for the satisfaction of the dues under Balai's mortgage. The mortgage bond in favour of defendant No. 1 is Ex. M. There can be no doubt that the money raised by the mortgage in favour of Doman was applied for the satisfaction of the dues under Balai's mortgage.

16. Apart from the plea that Avistakarini had an absolute interest in the estate defendant No. 1 has raised the further points that the plaintiffs' suit in respect of his mortgage is barred by limitation and assuming that Avistakarini had a limited interest, the mortgage was justified by legal necessity. The learned Subordinate Judge has held that the plaintiffs' suit is barred under Article 125 of the Limitation Act in respect of the mortgage in favour of defendant No. 1 but it is not justified by legal necessity. The learned Advocate appearing for the heirs of defendant No. 1 has challenged the decision of the Court below on the question of legal necessity:

17. The first question, therefore, is whether the suit is barred under Article 125 of the Limitation Act which prescribes a period of twelve years for a suit of the present description from the date of alienation. The learned Advocate appearing for the appellants has argued that the plaintiffs' right was clouded not by the mortgage which might be satisfied by the mortgagor, but by the sale which was held on 20-5-1930 (vide Ex. A) and therefore the starting point of limitation should be 20-5-1930 and as the suit was instituted on 23-1-1939 it is not barred by limitation. We cannot accept this argument as correct. The word "alienation" in Article 125 does not include an auction sale held in execution of a decree but is confined to cases of voluntary alienation. If the argument of the appellants that the plaintiffs' right were clouded by the sale and not by the mortgage, be accepted the proper article applicable will be Article 120 of the Limitation Act under which the plaintiffs will have only six years from the date of the sale and in that view the suit will be barred. But we hold that Article 125 will apply to a case where the prayer is for a declaration that the auction sale in execution of the decree on a mortgage is not binding on the plaintiffs because the real alienation is by the mortgage executed on 17-8-24 and the decree and the sale are merely the result of the mortgage. This view is supported by the decision of the Madras High Court in the case of " Kamakshi Ammal Vs. Poochammal alias Kamakshi Ammal and Others, We accordingly affirm the decision of the Court below that

the plaintiffs" suit is barred by limitation against the heirs of defendant No. 1.

18. On the question of legal necessity the learned Subordinate Judge has held that the mortgage in favour of Daman Aditya was not justified by legal necessity inasmuch as the earlier mortgage in favour of Balai Chatterjee for the satisfaction of which money was borrowed from Doman Aditya was not executed for legal necessity. The earliest mortgage executed by Avistakarini was in favour of one Kiran Chandra Mitra for a sum of Rs. 6000/-. This mortgage was executed on the 3rd December, 1915 and it was repaid on the 21st February 1917. The mortgage in favour of Balai was executed on 3-9-20. The major part of the money raised by the mortgage in favour of Kiran Chandra Mitra was paid to Rakhal Dasi for the compromise of the Privy Council case which was pending in the High Court. The Subordinate Judge has found upon the materials on the record that the defendants have failed to prove that the money raised by the mortgage in favour of Balai was applied to the satisfaction of the dues of Kiran Chandra Mitra. He has also found upon an examination of the financial position of the estate of Surendranath Mukherjee that the loan from Balai was the result of a thriftless and improvident management of the estate by Avistakarini. As a result of these findings; the Subordinate Judge has come to the conclusion that the loan from Balai was not for purposes of legal necessity and the mortgage in favour of Doman which was executed for paying off Balai was not also justified by legal necessity. Mr. Gupta appearing for the heirs of defendant No. 1 has argued that it is not necessary to show that Balai's mortgage was executed for legal necessity; it is enough to show that Doman advanced money to relieve the present pressure upon the estate. We think there is great force in this contention. In "HANOOMAN PRASUD PANDAY v. MT. BABOOEE MUNRAJ KOONWEREEV 6 Moo Ind App 393 at pp. 423-424 the Judicial Committee made the following observations with regard to the power of borrowing by a Manager of an infant:

"where the charge is one that a prudent owner would make in order to benefit the estate, the bona fide lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, the benefit to be conferred upon it, is the thing to be regarded. But, of course, if the danger arises or has arisen from any misconduct to which, the lender is or has been a party he cannot take advantage of his own wrong, to support a charge in his own favour against the heir, grounded on a necessity which his own wrong has helped to cause. Therefore the lender in this case; unless he is shown to have acted mala fide, will not be affected, though it be shown that with better management the estate might have been kept free from debt."

It is now beyond question that the above observations which were made by this Privy Council with regard to the power of the manager of an infant apply to the power of "borrowing of all limited owners. In the case of "GANESH LAL v. KHETRAMOHAN", 53 Ind App 134 (P C) the Privy Council held that where the cosharers of a Hindu widow's husband attached the dwelling house in execution

of a decree for contribution obtained against the widow for her failure to pay revenue due upon her share, an alienation by the widow of part of the estate for the purpose of discharging the decree is for necessity and is binding upon the reversioners. In the case, of "NILADRI SAHU v. CHATURBHUI DAS" 53 Ind App 253 (P C) which deals with the powers of borrowing by a mortgagor the Judicial Committee held that the power to incur debts must be measured by the existing necessity for incurring them, it is the immediate and not the remote cause of the borrowing which has to be considered.

19. In our opinion the aforesaid principles apply to the facts of the present case. We have already found that the mortgaged property had been put up to sale in execution of Balai's mortgage decree and for discharging that decree Avistakarini raised the loan of Rs. 20,000/- by execution a mortgage in favour of Doman Aditya. So even if the loan from Balai Chatterjee was the result of mismanagement by Avistakarini, Doman Aditya will not be affected by it provided of course he is a bona fide lender and did not contribute to the mismanagement. In this case, the plaintiffs alleged in their plaint that the mortgage in favour of Doman Aditya was a collusive transaction, but that allegation was not substantiated by evidence. The learned Subordinate Judge has found that the mortgage in favour of Doman was a genuine transaction and that finding has not been challenged in appeal. There is no suggestion that Doman Aditya contributed to the mismanagement by Avistakarini. In these circumstances we are bound to hold disagreeing with the Court below that the mortgage in favour of Doman Aditya was for legal necessity and as such it is binding on the reversioners.

20. The Subordinate Judge has also held that there is no recital of legal necessity in the mortgage bond. Ex. M executed in favour of Doman Aditya and therefore the evidence about legal necessity is an afterthought. We cannot accept this view as correct. In the case of "WOMESH CHANDRA v. DIGUMBUREE DOSSEE" 3 W R 154 it was held that the absence of recital about legal necessity does not vitiate an alienation; because legal necessity may be proved by other evidence. The fact that the bulk of the money borrowed from Doman Aditya was utilised for discharging the decree obtained by Balai in our opinion justifies the conclusion that the loan from Doman Aditya was for legal necessity.

21. In the view we have taken about the legal rights of Doman Aditya in advancing the money to Avistakarini it is not necessary for us to come to a decision on the question whether the loan from Balai Chatterjee was justified by legal necessity.

22. (b) "Mortgage in favour of Defendant No. 2 Nripendra Nath Bose." From the materials on the record it appears that Doman Aditya obtained a decree for Rs. 34,412/- on his mortgage and in execution of that decree auction purchased item No. 2 of Schedule (Ka) vide sale certificate Ex. A. Thereafter Doman obtained a personal decree for the balance of his dues and put that decree into execution - From Ex. B1(a) the order-sheet it appears that the personal decree was fully satisfied on 14-8-35 and on 9-8-1935 Avistakarini borrowed a sum of Rs. 16,

000/- from Defendant No. 2 by executing the mortgage bond Ex. 1 in respect of items (1) and (3) of Schedule Ka of the plaint, it appears that portions of the dues of Doman's personal decree were satisfied by borrowing from one Akshoy Kumar Mukherjee and one Satyabhama Dasi and the money advanced by defendant No. 2 was applied towards the satisfaction of the dues of Akshoy Kumar Mookerjee Satyabhama Dasi and the balance of the dues under the personal decree of Doman Aditya. The Subordinate Judge has found and that finding has not been challenged before us, that out of Rs. 16,000/- advanced by defendant No. 2, Rs. 11,076-13 as was applied towards the satisfaction of the dues of Doman Aditya. Moreover, Ex. F(I.), a handnote shows that Avistakarini and her husband had borrowed a sum of Rs. 500/- from defendant No. 2 on the 24th July 1935 and Ex. H (1), another handnote shows that they had borrowed another sum of Rs. 700/- from defendant No. 2 on 7-8-35. From the oral evidence adduced in the case which, has not been challenged before us the Subordinate Judge has found that the first amount was taken for meeting the costs of the Solicitor for searching the documents of title of Avistakarini and the second amount was taken for purchasing a property within the original jurisdiction of this Court, for inclusion in the mortgage bond. The sums advanced on these two handnotes were included in the amount of Rs. 16,000/- which was borrowed on the mortgage bond Ex. 1. In the mortgage bond there is a further recital, to the effect that Avistakarini also required money for the marriage of her second daughter, Kurunamoyee.

23. The Subordinate Judge has found that the mortgage bond Ex. 1 was a bona fide document and that Avistakarini received full value for the deed. In spite of that he has held that it was not executed for legal necessity, because the debt due upon Doman's personal decree was merely a personal debt of Avistakarini and Karunamoyee has not yet been married and no enquiry was made by defendant No. 2 as to whether money was necessary for Karunamoyee's marriage. The Subordinate Judge has further held that the mortgage in favour of defendant No. 2 hangs by the same thread as the mortgage in favour of Doman Aditya inasmuch as the major part of the consideration was applied for the satisfaction of Doman Aditya's debt. As we have found that the debt due to Doman Aditya was for legal necessity and as it is clear that the bulk of the amount advanced by defendant No. 1 was applied to the discharge of Doman Aditya's dues. We hold that the money advanced by defendant No. 2 was also for legal necessity. In the cases of "SURAJ BHUSAN SING v. CHAIN SUKH" 32 Cal W N 117 (PC) and "SRI KRISHNA DAS v. NATHU RAM" 54 Ind App 79, (PC) the Privy Council held that if the bulk of the consideration is proved to have been applied to "legal necessity the entire alienation must be held to be good and valid. In the present case the defendant No. 2 has proved that out of the consideration of Rs. 16,000/-, about Rs. 12,300/- was applied to legal necessity. We accordingly hold the mortgage in favour of defendant No. 2 to have been executed for legal necessity even if the defendant No. 2 has failed to prove that money was required for Karunamoyee's marriage.

24. Mr. Bhattacharjee appearing for defendant No. 2 has further argued that the plaintiffs are precluded from challenging the validity of the mortgage Ex. 1 on account of the fact that all of them consented to it. The Subordinate Judge has found that only plaintiffs Nos. 2, 3; and 5, namely Birendra, Nirendra and Ramendra gave their consent but the remaining plaintiffs Khagendra and Debendra did not. In the draft mortgage bond Ex. Gl (a) there is an endorsement "Perused, approved, confirmed and1 consented to by us", and this endorsement is signed by Birendra, Nirendra, Ramendra and by Upendra as the natural guardian of Debendra who was described as a minor. So also in the letter of consent Ex. K (1) dated 7-8-35 there is a recital that all the plaintiffs were approving of and confirming the mortgage but the letter is signed by Ramendra, Birendra, Nirendra and by Upendra as the natural guardian of his minor son Debendra. P.W. 1 Girija Nath Banerjee, the younger brother of Upendra, states in his evidence that Debendra was born in 1916. So at the time the mortgage bond was executed and the letter Ex. K (1) was written, Debendra was really a major. From the evidence of D.W. 7 - Rule C. Ghose, Solicitor for defendant No. 2 it appears that Debendra was present at the time the endorsement in Ex. Gl (a) and the letter Ex. K (1) were written and represented that he was a minor.

25. From this evidence we are inclined to hold that Debendra who was a major allowed his father Upendra to sign his name with a full knowledge of the nature of the transaction and therefore he is also bound by the endorsement in Ex. Gl (a) and the recitals in Ex. K(I). With regard to Khagendra it is no doubt true that his signature does not appear in Ex. Gl (a) and K (1) but the evidence about his conduct points to the conclusion that he was also a consenting party. From Ex. F(I), the hand-note by which Avistakarini borrowed Rs. 500/-from defendant No. 2 for meeting the costs of the search of title deeds, it appears that Khagendra explained the recitals of that document to Avistakarini. D. W. 7 R. C. Ghose, Solicitor has deposed to the effect that Khagen was one of the persons who took him to the house of Doman's pleader for inspection of title deeds. He has further said that Khagen was present when the draft Ex. Gl (a) and the letter Ex. K(I) were being explained and promised to put his signature after his other brothers had signed. He went away on some business promising to come back immediately; but thereafter Khagen did not come back to the office of the Solicitor but went to the Solicitor's residence and his signature could not be obtained because the draft and the letter were not with the Solicitor at his residence as he had left them in the office. D.W. 11 Pran Krishna Deb, pleader who acted for Avistakarini in her transaction with defendant No. 2, states in his cross examination that it is not a fact that Khagen refused to sign because he did not accept the absolute title of Avistakarini. Upon this evidence we hold that the absence of Khagen's signature is not due to any refusal on his part to consent to the transaction," but is the result of an accident. His conduct shows that he was taking an active part in the transaction and was a consenting party to it. We accordingly hold that all the plaintiffs including Khagendra and Debendra were consenting parties to the transaction in favour of Defendant No. 2 and are bound

by it.

26. (c) "Mortgage in favour of Defendants Nos. 3 and 4." (After going through the evidence, his Lordship held that the Subordinate Judge was right in holding that the mortgage bond in favour of defendants Nos. 3 and 4 was not for legal necessity. The Judgment then proceeded).

27. The last point argued by Mr. Mitra for defendants Nos. 3 and 4 is that in view of the fact that the mortgaged property is wholly situate within the jurisdiction of the Howrah Court the trial Court had no territorial jurisdiction to try the suit in respect of the mortgage in favour of defendants 3 and 4. This point about want of territorial jurisdiction was not raised by defendants Nos. 3 and 4 in their written statement nor was it raised before the statement of issues. Consequently we hold that the defendants Nos. 3 and 4 are precluded from raising this question in the appellate Court u/s 21, C. P. Code.

28. (d) "Lease in favour of defendant No. 5 (Nayan Chandra Dutta)." By an indenture of lease, Ex. Order dated 30-4-31, Avistakarini demised about 4 1/2 cottas of vacant land to defendant No. 5 for a term of 20 years on taking a selami of Rs. 325/- and reserving an annual rent of Rs. 204/-. The Subordinate Judge has found that though this lease was not executed for legal necessity it was not for a very long period and it was within the ordinary powers of management of a female heir and as such is was binding upon the plaintiffs: During the pendency of the appeal the lease has expired by efflux of time during the lifetime of Avistakarini. From the lease Ex. O, it appears that no benefit is reserved in favour of the lessee after the expiry of the term: For this reason we hold that the plaintiffs have no longer any cause of action in respect of this lease & the suit must be dismissed on that ground only.

29. (a) "Permanent lease in favour of Defendants Nos. 6 and 7 (Bechulal Saha and Jagannath Saha)." On the 22nd April, 1934 Avistakarini entered into an agreement with defendants Nos. 6 and 7 to execute a permanent lease in respect of 8 cottas of land for a selami of Rs. 1400/-. As the land was found on measurement to be smaller in area the lease was not executed whereupon defendants Nos. 6 and 7 instituted a suit for specific performance. This suit was compromised on the final date of hearing and in pursuance of the terms: of compromise Avistakarini executed the lease in dispute in respect of 5 Chittaks of land for a selami of Rs. 1005/- and an annual, rent of Rs. 22/8/-. From the evidence of "D. W. 19" Janaki Nath De who acted as Avistakarini's pleader in that suit it appears that Haziras were filed on behalf of Avistakarini by her husband Upendra and also by two of her sons Birendra and Ramendra. Upon this evidence the Subordinate Judge has found that the compromise was bona fide. But it cannot be said, that the compromise was in the nature of a family arrangement which would bind the reversioners. No evidence was adduced to show that the lease in question was justified by legal necessity. The learned Advocate appearing for defendants 6 and 7, however, strenuously argued that in view of the fact that the letters of administration issued in favour of Avistakarini

were not actually recalled, it should be held that Avistakarini had an absolute interest in the estate. We have already dealt with this argument in an earlier part of the judgment. For the aforesaid reasons we affirm the decision of the Court below that the permanent lease, in favour of defendants Nos. 6 and 7 was not executed for legal necessity and as such it is not binding upon the plaintiffs.

30. To summarise our findings on the points raised in this appeal we hold that the compromise evidenced by Exhibits S, T & 5 represents a "bona fide" family arrangement which binds the reversioners; that the mort-gage bond, executed in favour of defendant No. 1 was for legal necessity and that the suit is barred by limitation against the heirs of defendant No. 1; that the mortgage bond in favour of defendant No. 2 was also for legal necessity and that in any event the plaintiffs are bound by the said mortgage bond, having consented to and confirmed the same; that the mortgage bond in favour of defendants 3 and 4 was not for legal necessity; that the plaintiffs have no cause of action in respect of the lease in favour of defendant No. 5 and that the permanent lease in favour of defendants Nos. 6 and 7 was not justified by legal necessity.

31. In view of our finding that the compromise between Rakhal Dasi and Avistakarini is binding on the reversioners the Plaintiffs' suit must be dismissed against all the defendants and this appeal must also fail and be dismissed with costs. Respondents 1 (a), 1 (b) and Respondent No. 2 alone will be entitled to the hearing fee of this appeal which we assess at 20 gold mohurs to be divided equally between the two sets. The cross objection filed by respondents, Nos. 3 and 4 will be dismissed without costs.

R.P. Mookerjee, J.

32. I agree.