
(1949) 04 CAL CK 0006
In the Calcutta High Court
Case No : A.F.A.D. No. 1177 of 1943

Chandi Prosad Ganguly and others

APPELLANT

Vs

Gadadhar Singha Roy and others

RESPONDENT

Date of Decision : 12-04-1949

Acts Referred:

Citation : (1949) 04 CAL CK 0006

Judgement

Das Gupta, J.—The seven villages which are the subject-matter of this litigation were held in patni tenure by Jatindra Nath Singh Roy and on his death by his two sons Kanai and Birendra, Kanai died on 6th February 1935, leaving a minor son Biswa as his heir. The appellants sued Birendra and Biswa for arrears of rent and obtained a decree against Birendra only on compromise. They put that decree into execution against Birendra's eight annas interest in the patni tenure. Before this, however, on 12th March 1935, Birendra and Biswa, the latter through his guardian mother, had executed a deed of sale of their interest in these villages, in favour of Jatindra's widow, Sarat Kumari, that is, Birendra's mother and Biswas' grand mother. Within a few days thereof on 2nd April 1935, Sarat Kumari executed a deed of mortgage in favour of the respondent Gadadhar. The respondent brought a suit to enforce the mortgage and obtained a decree against Sarat Kumari,—the preliminary decree on 20th August 1937 and the final decree on 20th September 1937. When the appellants, in execution of the decree obtained against Birendra, attached Birendra's eight annas interest, Sarat Kumari filed a claim case, and objected to the attachment, on the ground that Birendra's interest had passed to her by sale. This case was dismissed on 28th September 1937. Sarat Kumari instituted then a suit as contemplated under O. 21, R. 63, Civil P.C. This was dismissed on 6th May 1938. On 11th March 1938, the respondent, in execution of the final mortgage decree obtained by him, purchased some portion of the patni. The sale was confirmed on 26th April 1938, and possession was delivered to him on 5th May 1938. About nine months after this, in February 1939, the appellant purchased Birendra's eight annas share of the patni and obtained delivery of formal possession. During execution

proceedings, the respondent had filed an application for notifying his mortgage decree, but that was rejected. Unable, however, to obtain actual possession, the appellants brought this suit for declaration of their title to and for delivery of possession, jointly with the rightful owner of the remaining eight annas share.

2. The appellant's contentions in the plaint are that the sale by Birendra to Sarat Kumari, was a sham collusive, benami transaction and that no title passed by that sale to Sarat Kumari, that the mortgage to Gadadhar was also a collusive transaction, and that the mortgage decree and the mortgage sale were all in pursuance of a fraudulent scheme to defeat rightful claims against the estate and consequently, the eight annas interest in the patni which Birendra admittedly had was not affected by the mortgage sale, and appellants acquired good title by their purchase. It was further contended that the consequence of the dismissal of the application that was filed by the respondent in the execution proceedings was that no claim based by the respondent on the mortgage decree can be sustained.

3. The respondent in his written statement contended that the sale to Sarat Kumari was a genuine transaction and for consideration; that in any case, the mortgage deed was a genuine transaction, for consideration, and even if Birendra's interest had not passed by the sale deed to Sarat Kumari, the respondent by his mortgage and the sale in execution of the mortgage decree obtained good title thereto. It was also said that the application filed by the respondent in the execution case was really an application under O. 21, R. 66, Civil P.C., and did not put forward any claim and objection, and so the dismissal of that application cannot be held to be a conclusive decision on the question of the mortgage claim against the property in dispute. There was also an allegation that there were really two patnis—one of Rs. 1400 and the other of Rs. 95 and not one patni as alleged by the plaintiff.

4. The trial Court accepted all the plaintiff's contentions. He found that the sale was without consideration, that the mortgage was without consideration, that the respondent was not entitled to the protection of S. 41, T.P. Act, and that the dismissal of respondent's application barred him from basing any claim to the property on the basis of the mortgage decree or the sale in execution thereof.

5. He found also that there was really one patni for all the seven mauzas, and that the respondent's purchase was of two only of these mauzas. As respondent's purchase would remain valid, till set aside by Court, as regards the eight annas share of Biswa, he accordingly decreed that the plaintiffs would have joint possession for these two mauzas jointly with Gadadhar, and for the other mauzas, jointly with Biswa. He gave plaintiffs a declaration of their title to eight annas share of the patni as prayed for.

6. On appeal, the District Judge agreed with the trial Court that there was one patni for all the seven mauzas, and that the respondent's purchase was only of two of these mauzas. On all other points, he reversed the findings of the trial Court. He held that the sale to Sarat Kumari was for consideration, that the

mortgage was for consideration and that Gadadhar was entitled in any case to the protection of S. 41, T.P. Act. He held further after almost a nominal discussion of the question, that the dismissal of the application filed by Gadadhar in the execution case would not stand in his way. Accordingly, he reversed the decree as regards the two mauzas Brittinuda and Lakshmigacha though he maintained it as regards the other mauzas.

7. Three principal questions have been raised by Mr. Sanyal in support of this appeal against the District Judge's partial reversal of the trial Court's decree. The first is that the dismissal of Sarat Kumari's claim case and the subsequent suit was conclusive against Gadadhar also, and so Gadadhar was barred from contending that Birendra's interest passed to Sarat Kumari by the sale deed. His second point is as regards the effect of the dismissal of Gadadhar's application in the execution case. He contends that the effect is that in consequence of the provision of O. 21, R. 63, Civil. P.C., Gadadhar cannot claim any title on the basis of the mortgage decree.

8. Lastly, Mr. Sanyal contends that the learned District Judge's finding as regards the genuineness of the sale-deed is vitiated by errors in law, and that the learned Judge has also erred in law in finding that the respondent would be entitled to the protection of S. 41, T.P. Act.

9. The first question of law that arises, therefore, for decision in this appeal, is whether the decision in an objection under O. 21, R. 58, Civil P.C., and the decision to the same effect in a subsequent suit under O. 21, R. 63, Civil P.C., against a mortgagor are conclusive against a mortgagee, where mortgage is of a date prior to the litigation. The ordinary principle of law is that no person is bound by a decree or order in proceedings to which he is no party. This is, however, limited by the equally well-recognised principle that persons claiming under parties to a proceeding are as much bound as the parties themselves. Where, therefore, an estate is fully represented in a litigation, a decision binding against the present holder of the estate will be binding against later holders of the estate. It is on this principle that the decision in a suit brought by or against a Hindu widow, is binding against reversioners, where the widow represents the estate. The argument advanced on behalf of the appellants is that the equity of redemption was fully represented in the O. 21, R. 58, Civil P.C. case and O. 21, R. 63, Civil P.C., suit by Sarat Kumari; and so, when the respondent by his purchase acquired this equity of redemption as it stood at the date of the mortgage, he was bound by the decision in the proceedings.

10. The argument would be worth careful consideration, if the matter was *res integra*. But it is not. The cases in which it has been held that a mortgagee would not be bound by an adverse judgment against his mortgagor rendered in any action instituted after the creation of the mortgage are mentioned by Sir Rashbebari Ghosh in his *Law of Mortgages*, at p. 331. That learned author has no doubt said that some of the cases seem to rest upon the assumption, not altogether well founded that a restricted power of dealing with property involves

an incapacity to represent the estate in any litigation connected with it; but as he himself recognises the question was concluded by authority.

11. The earliest decision is of the year 1869, in *Dooma Sahoo v. Joonarain*, 12 W.R. 362 : (4 Beng. L.R.A.C. 27n). A suit was instituted by a mortgagee for enforcement of his mortgage lien bearing date 13th October 1863. The defendant pleaded that the mortgage was a collusive transaction, that he, the defendant, had obtained a mokarari lease of the property in question from the ancestor of the alleged mortgagor long previous to the date of the mortgage and that in execution of a decree obtained by him against the mortgagor the right, title and interest of the mortgagor was put up to sale and purchased by the defendant in 1867. The question the Court had to consider was whether the decisions in a suit instituted after the date of the plaintiff's mortgage that the defendant had obtained a mokarari lease of the property long previous to the mortgage were binding against the mortgagee, who was not a party to that suit. It was held that he could not be bound by any decision in such a suit.

12. In *Bonomalee Nag v. Koylash Chunder Dey*, 4 Cal. 692, the Court had to consider whether the decision in a suit brought by a mortgagor after the mortgage that another person had a right of way over the property, was binding against the mortgagee. Both the learned Judges (Markby and Prinsep JJ.) thought that the question was not free from doubt, but that they were bound by the Court's decision in *Dooma Sahoo's* case (12 W.R. 362 : 4 Beng. L.R.A.C. 27n), and held that the decision was not binding against the mortgagee. Markby J. said that he would express no opinion of his own; Prinsep J. observed in his judgment that it could not be held that a mortgagor in possession so far represents the entire estate as to affect the right of a mortgagee.

13. A fuller dissuasion of the question is to be found in the judgment of the Court in *Shoshibhusan Guha v. Gogan Chunder Saha*, 22 Cal. 364. The defendants (other than the mortgagee defendant) had contested the mortgagee's suit to enforce his mortgage on the ground that as auction purchasers of the taluka in execution of decree for arrears of rent, they had purchased the same free of all incumbrances and that the mortgage was no longer enforceable against the taluks. It was contended that the mortgagee was bound by the orders made in the course of the proceedings in execution of the rent decree in the presence of the talukdar the mortgagor.

14. Their Lordships observed at the outset that the matter was not *res integra* and that there was a strong current of decisions against the above contention. After mentioning the authorities, their Lordships go on to observe:

Nor are the reasons urged on behalf of the appellant sufficient to induce us to dissent from the view taken in the cases cited above. The general rule is that a judgment *inter partes* binds only the parties and persons, deriving title from them subsequent to the date of the judgment.... There are no doubt many exceptions to this rule, but they are based either on grounds of justice, and

expediency as in the cases in which judgments against a Hindu widow or a sebaity have been held to be binding on the reversioner, or the succeeding sebaity, or upon express legislation, as in the cases in which decrees for rent against registered tenants have been held to be binding on unregistered transferees of tenures, but the present case does not come under any of these descriptions. A Hindu widow or sebaity must be held to represent the estate completely, as otherwise there could be no one to represent such estate. But the same thing cannot be said of the proprietor of an estate after he has mortgaged it. The mortgagee can always be ascertained, very often his interest in the estate may be much greater than that left in the mortgagor; and sometimes, as in the present case where after the decree it was no part of the mortgagor's interest to protect the incumbrance, the interests of the two are not identical. While on the one hand, to one who is anxious to acquire a safe title by *res judicata*, the inconvenience in including the mortgagee as a party defendant, is not very great, on the other hand, the injustice of binding the mortgagee by a decree to which he was no party, must be very considerable.

15. On these considerations, and a discussion of the rent law, which according to their Lordships did not furnish any clear reason against the view that the decisions in proceedings against the mortgagor were not binding upon the mortgagee, their Lordships held that on reason and authority, this view was correct.

16. In more recent times, we have a decision of the Bombay High Court where the same view is taken: *Ramchandra Dhondo v. Malkapa Narsapa*, 40 Bom. 679 : (A.I.R. 1916 Bom. 204). The original owner of the property which was involved in that litigation was one Devare. During his minority, his mother executed a deed of sale for this to the Bhojes; one Barchi received it from the Bhojes in exchange for another parcel of land. Thereafter Barchi mortgaged the property to Ramchandra. Some years after this Devare brought a suit against his mother Barchi and the Bhojes to set aside the sale by his mother to the Bhojea. That suit was successful and the sale was set aside. Thereafter Ramchandra obtained a decree on his mortgage and in execution thereof purchased the property. When he tried to get possession, he was resisted by Devare. He brought a suit for possession, and the appeal before the High Court arose out of the suit. The question was whether in spite of the result of Devare's suit, it was still open to Ramchandra to show, if he could show, that the alienation by Devare's mother to the Bhojes was good in law. The question was answered in the affirmative.

17. In the face of this long line of decisions of this Court, and also of other High Courts in India the question whether the mortgagee is bound by a decision against his mortgage, in legal proceedings instituted after the date of the mortgage is no longer open to discussion. The question is concluded by authority. We may add that we respectfully agree with the proposition laid down in these decisions, and hold that the mortgagee is not bound by a decision against his mortgagor, in legal proceedings instituted after the date of mortgage. I hold,

therefore, that Gadadhar is not bound by the decision in Sarat Kumari's claim case and the subsequent suit brought by her.

18. The decision of the next question-whether the dismissal of the application that was filed by Gadadhar in the execution case bars his claim depends on the determination of the question, whether this was an application, under O. 21, R. 58, Civil P.C. If it was, then by the provisions of O. 21, R. 63, Civil P.C., the decision in that application is conclusive as between Gadadhar and these appellants, as admittedly no suit as contemplated in O. 21, R. 63, Civil P.C., was brought. Order 21, R. 58, Civil P.C., is in these words:

(1) Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector, and in all other respects, as if he was a party to the suit:

Provided that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed.

(2) Where the property to which the claim or objection applies has been advertised for sale, the Court ordering the sale may postpone it pending the investigation of the claim or objection.

19. It is necessary to consider in this connection that the words of O. 21, R. 62, Civil P.C., which indicate the relief that can be given by the Court, when objection to the attachment on the ground of mortgage is made by any person. It is quite clear, however, and is not disputed that even without making any such objection on the ground of the property being affected by mortgage, an interested party may pray that the existence of a mortgage claim may be mentioned in the sale proclamation. The admission or rejection of such a prayer will not operate as a binding decision on the question whether the property is in fact subject to the mortgage. Whether the decision will have a binding effect under the provisions of O. 21, R. 63, Civil P.C., depends clearly therefore on the nature of the relief asked for. If all that is asked for is that the mortgage asserted be inserted in the sale proclamation there is no scope for the operation of O. 21, R. 63, Civil P.C. If that is asked for in substance, is that the attachment and consequently the sale-be made subject to the mortgage, the application must be held to be one under O.21, R. 58, Civil P.C., and so the decision will be conclusive under O. 21, R.63, Civil P.C., as between the parties to the application.

20. What is the position, where, as in the present case, there is no clear prayer for either of the reliefs indicated above? The substance of the matter has to be looked into; but I find no justification for thinking that if there is no clear prayer for insertion of the mortgage claim in the sale proclamation, it follows necessarily that the prayer is in substance for the other relief-viz., that the attachment be subject to the mortgage. There would be equal justification for holding that if there is no clear prayer for the latter relief it follows necessarily that the prayer is

in substance for an insertion in the sale proclamation, of the mortgage claim.

21. Where an examination of the application clearly shows the relief asked for to fall under the one or other of the two categories indicated above, there will obviously be no difficulty. Where it cannot be ascertained whether the relief asked for is for the continuance of attachment subject to mortgage, or for insertion of the mortgage claim in the sale proclamation, it must be held that O. 21, R. 63, Civil P.C., can have no application, for these drastic operations cannot be extended to doubtful cases. Reference may be made in this connection to the decision of Mitter J. in (Dewan) Emdad Ali Vs. Haran Sheikh and Others, .

22. Applying these principles to the application filed by the respondent, I am of opinion that the decision on that application is not conclusive. The application does not mention either O. 21, R. 58, Civil P.C., or O. 21, R. 62, Civil P.C., or O. 21, R. 66, Civil P.C. The application may be translated thus:

Decree-holder

Judgment-debtor

Applicant

Narendranath Ganguly etc.

Birendra Nath Sinha Roy and minor Biswa Nath Sinha Roy through guardian mother Nivananli

Gadadhar Sinha Roy

It is submitted on behalf of the Applicant that the eight annas interest of the properties of the judgment-debtors have been proclaimed for sale at the instance of the decree-holder and 16th November 1937 is fixed for the sale. The applicant is the mortgagee for the sixteen annas interest of the attached property mentioned above and having obtained a mortgage decree against the judgment-debtors on account of the mortgage debt in Mortgage Suit No. 110 of 1937 of this Court has executed it in M. Execution Case 1419 and has prayed for realisation of his dues by the sale at auction of the mortgaged property. The dues on account of the mortgage decree have not been mentioned in the sale proclamation of this rent execution case. It is necessary that it should be so mentioned, or else the applicant may suffer material damage. So it is prayed that proper orders may be passed for the sale of the property with proclamation at the auction, of this matter of the dues on account of the mortgage decree in Suit No. 1419 of 1937.

23. It is to be noticed that though the application states that the sale proclamation has not mentioned the mortgage dues and the seriousness of the omission is stressed, the prayer is not for amendment of the sale proclamation. Nor is any prayer made for issue of fresh proclamation after correcting these omissions. It is equally clear, however, that there is no prayer for attachment to continue subject to the mortgage claim. I am unable to agree with the learned

advocates for the appellant that the prayer for orders for sale with proclamation of the matter of the dues on account of the mortgage decree is in substance a prayer for sale subject to the mortgage decree.

24. Reliance was, however, placed by the learned advocate on the decision in *Ambica Prosad Sanyal Vs. Soorajmull Nagarmull Firm and Another*, . There are certain observations in that judgment which at first sight appear to lend support to the learned advocate's contention that when there is no prayer for amendment of the sale proclamation, or the issue of a fresh one, an application praying that the fact of the property being subject to a mortgage might be notified and proclaimed at the sale, should be treated as a claim petition. Reading the judgment as a whole, I am of opinion that the learned Judges did not intend to lay down a general proposition of this nature. Their decision that the petition in the case before them was an application under O. 21, R. 58, Civil P.C. was clearly on a reading of the petition as a whole. At p. 1003 Mukherjea J. says this:

Mr. Sanyal has argued that really he did not want that the property should be sold subject to the mortgage, but the plain reading of the petition does not lead to any other conclusion. Obviously it was not the time when the sale proclamation was being prepared and the petitioner also did not make any prayer whatsoever that the sale proclamation might be amended by mentioning the incumbrance upon the attached property or that a fresh sale proclamation might be issued and served in the locality. The object of his reciting in extenso the fact of the mortgage and the interest it carried seems to me to point to the conclusion that he wanted that the property should be sold subject to the mortgage. This is strengthened by the fact that the petition was headed under O. 21, R. 62, Civil P.C.

25. The heading of the petition under O. 21, R. 62, Civil P.C. was a distinguishing feature of the petition in that case, and weighed with the Court, though by itself it might not have been conclusive. The observations in that context were not in my judgment intended to lay down any general principle, as contended by the learned advocate.

26. There remains for consideration the third branch of the appellant's case before us. It is really in two parts. The first is that the finding of the appellate Court below that the sale deed to Sarat Kumari is vitiated by errors of law. The second part of this branch of argument is that once it is found that the sale deed to Sarat Kumari was a sham transaction, the defendant's claim to the property cannot succeed unless he gets the protection of S. 41, T.P. Act, and this, it is said, he has failed to establish.

26a. It seems clear to me that when the appellants have come to Court for declaration of their title and possession on the basis of such title, the burden is heavily on them to show that nothing passed to Sarat Kumari by the sale deed. Until they can show this, they must fail, and the question of the protection of S.

41, T.P. Act, would not arise at all. On this all important question, whether the sale to Sarat Kumari was a genuine transaction for consideration, or a sham paper transaction for fraudulent purposes the appellants are faced with this that the decision of the Court of Appeal-the final Court of facts-is against them. To get rid of this difficulty, the learned advocate for the appellant has contended that that finding is vitiated by errors of law. In my opinion, this contention is correct.

27. Strange to say, neither the original sale deed nor its certified copy has been produced in Court. As the respondent traced his title to this sale deed, it was reasonable to expect him to produce the original sale deed from Sarat Kumari, who, it has to be remembered is related to him through his brother and does not appear to be unfriendly to him. At the same time, it has to be remembered that the appellants themselves do not dispute the existence of a sale deed to Sarat Kumari for the properties in dispute. The burden then is on them to show that it was a benami fraudulent document; and it was therefore their duty to demand the production in Court of the original sale deed, and if that was not produced, to give secondary evidence by producing a certified copy of the document, as otherwise there would be no means of ascertaining what consideration was mentioned in the document, and consequently, no means of showing that consideration did not pass. In view of the fact, however, that both the parties proceeded in the Courts below on the assumption that the consideration mentioned in the document was Rs. 500 in cash, and Rs. 4500 set off against the, purchaser's dues against the vendor, I am of opinion that this fact should be taken to be proved by the admission of both parties.

28. It was in this position that the appellants asked the Court to hold that the story of Saras Kumari having previous dues against her son and grandson was absurd and unbelievable. The learned District Judge relied, however, on Gadadhar's statement in a previous case that Sarat Kumari advanced Rs. 2000 on the occasion of Birendra's marriage, and a statement in a previous judgment that in that case documentary evidence showing withdrawal of Rs. 2000 from Sarat Kumari's pass book two or three days prior to Birendra's marriage. From these, the learned Judge concluded that Sarat Kumari had private means and she used to advance money to her sons.

29. If Gadadhar had made a statement as mentioned above in this case, and if documentary evidence of the withdrawal of money from Sarat Kumari's pass book had been adduced in this case, there would have been no ground for taking exception to the Judge's conclusions whether or not, his reasoning was acceptable to us. Gadadhar was examined in this case, and has not said a word about any loan by Sarat Kumari at the time of Birendra's marriage. The evidence given by him in the previous case is not relevant in this case, I am unable to agree with Mr. Sen, that it is relevant under S. 11, Evidence Act, This previous statement of Gadadhar could have been used by the appellants for the purpose of contradicting Gadadhar's evidence in this case; but the fact that the appellants put this previous deposition in evidence does not make it relevant for

all purposes. In my judgment, the learned District Judge has erred in law in relying on this previous deposition of Gadadhar, in his own favour.

30. He has equally erred in law in basing a conclusion on documentary evidence not produced in this case, but said to have been produced in a previous case. The judgment of the previous case is not even evidence to show that such documentary evidence was produced.

31. The main foundation of the learned Judge's decision that consideration passed is therefore vitiated by his reliance on circum stances established by irrelevant evidence. His finding of fact that the document of sale was genuine cannot, therefore, stand.

32. I have therefore considered the evidence on the record for myself for the purpose of deciding whether the sale to Sarat Kumari was genuine. (His Lordship after considering the evidence, proceeded:) After anxious consideration I am unable to discover any reason for which Birendra and Biswa could have bona fide transferred their Patni interest in these seven villages to Sarat Kumari.

33. On the other hand, I can see many reasons why they should create a benami document. The first is that the estate was admittedly heavily encumbered. The second is that they were not running much risk of losing the property as, on Sarat Kumari's death, they would get it as her heirs. The third is that if the estate was nominally Sarat Kumari's, the many difficulties in its administration due to Biswa being a minor would disappear.

34. It would be convenient to consider next, the conduct of the parties who were affected by the sale. Was the conduct such as we should expect if there was a real sale? [His Lordship considered this and continued:] On a consideration these circumstances, my unhesitating conclusion is that the sale deed to Sarat Kumari was a benami deed, and no interest passed to her by that.

35. The appellants therefore obtained good title by purchase in the Court sale of Birendra's eight annas share in the patni. The respondent will still be able however to resist a decree, as regards the two mouzas which be purchased in execution of his mortgage decree, provided he is entitled to the protection of S. 41, T.P. Act.

36. If the mortgage bond evidenced a genuine transaction and was for consideration, he must be held to be a transferee for consideration. On this, we have the finding of the learned District Judge in the respondent's favour, and I find nothing to justify interference with that finding.

37. The learned District Judge has also found that the respondent acted in good faith. It is clear also that he was of opinion that Gadadhar had made reasonable enquiry through his brother Girija. Though on this important matter he has not recorded a clear finding that the respondent took reasonable care to ascertain that the transferor had power to make the transfer, he is apparently of opinion that the respondent did take such care.

38. We are bound to accept as correct the learned District Judge's finding of fact that the respondent made certain enquiries through Girija. The question whether the action he took amounted to "taking reasonable care to ascertain that the transferor had power to make the transfer" is a question of law, and requires our careful consideration. "Reasonable care" has been explained to mean such care as an ordinary man of business would take and this obviously would vary with circumstances. Some circumstances would prima facie arouse suspicion, and would call for a detailed enquiry; other circumstances would make only a nominal enquiry sufficient. What would an ordinary man of business feel on learning that his proposed transferor had just acquired her title from her son and grandson? I have no doubt that an ordinary man of business would feel that the transferor's power looked very suspicious; for a transfer to a woman from her son and grandson is very unusual. The first care of an ordinary man of business in such circumstances would be to try and find out if the transfer from the son and grandson was a genuine transaction for consideration. The respondent does not even claim to have made any enquiry to find out if the transfer to Sarat Kumari was for consideration. His evidence shows that the only point on which he asked for information from Girija and Manindra was whether the property was subject to any mortgage and whether Sarat Kumari was in possession of the property. He says further that they informed him that Sarat Kumari was in actual possession. Girija is D.W. 7 and says that he made enquiries according to Gadadhar's letter. But he does not say a word about making any enquiry as to whether Sarat Kumari was in actual possession. All he says about the enquiry is that he came to learn on search from the Sub-Registry office that a kobala had already been executed and registered in favour of Sarat Kumari in respect of mortgaged property; and then on going to Sonadanga, he ascertained the average income of the mahal with reference to the record of rights and the collection papers of the previous years; that he was satisfied that the proposed advance to Sarat Kumari would be a safe investment, and he expressed his opinion to the defendant by a letter. Not a word about who was in possession of the estate? It would almost seem that Girija, a lawyer and a man of the world, was blissfully ignorant that a pernicious practice of benami sale deeds does exist in this sinful world!

39. An argument was advanced on behalf of the respondent that he must be held to have taken sufficient care, if he asked Girija to make the necessary enquiries and Girija informed him that the sale was genuine; and stress is laid on the documentary evidence of Ex. W2, a letter written by Gadadhar to Dharani. The relevant portion of the letter runs thus:

I wrote to Mejda (meaning Girija) on 16th instant to enquire about the fact of her purchase of these two patni mahals among other properties from Birendra and Nivanani for consideration of the debt due to her by the Sonadanga Estate. Mejdada writes to me about the result of his enquiry. He Says that purchase by registered kobala is real and that she has actually taken possession of the kobala properties..... He assures me that it will be a good investment. I have now finally

decided to advance to her Rs. 2825. I already sent Rs. 800 to Mejda on 19th as my first instalment of the advance.

40. This letter would be admissible in corroboration of Gadadhar's testimony in Court, if he had said here that Girija gave him such information. In order that he could give such secondary evidence of Girija's letter, he would have had to prove that the letter was missing. This has not been proved; and Gadadhar has not said in Court that Girija's letter contained these statements. The letter Ex. W2 is not, therefore, admissible in evidence. Supposing, however, it is admissible in evidence, it is of little assistance to Gadadhar.

41. If Girija did really write to him all that is said in Ex. W2 why does not Girija say so in Court? If he had said in Court that there was a genuine purchase by Sarat Kumari, and that she had actually taken over possession, he would have been asked how he found out all this; and that was a question he wanted to avoid. That is the only explanation I can think of for his not saying in Court the things he is supposed to have written to Gadadhar. In the face of his evidence in Court, it is absurd to suggest that Girija did really ascertain on enquiry that Sarat Kumari had taken over possession of the properties, and that the sale was real, I cannot believe that Girija wrote to Gadadhar what is mentioned in Ex. W2 as his statement.

42. Supposing however that Girija did write to Gadadhar that the sale was real, and that Sarat Kumari had taken over possession, I do not think an ordinary man of business would have been satisfied with that. Such a man would know that a make-believe transfer of possession is generally gone through to conceal benami, and that this process would be all the easier, where the vendor and purchaser are as closely connected as in this case. An ordinary man of business would in such circumstances take care, before parting with good money, to find out what consideration did actually pass; and also what was the necessity of making a transfer. Admittedly, the respondent did not make any attempt to find out any of these things.

43. It may be mentioned that the learned Judge has found that Manindra did not make any enquiry. I agree with this finding.

44. My conclusion is that the respondent did not take reasonable care to ascertain that Sarat Kumari had power to transfer.

45. I believe also that Dharani, Sarat Kumari's son-in-law, knew very well that the sale to Sarat Kumari was a sham transaction. It is not likely that he concealed this knowledge from his brother, the respondent. My conclusion from the circumstances is that the respondent had reason to believe before he advanced the money on the mortgage bond that the sale to Sarat Kumari was a sham transaction. The explanation why he advanced an amount of nearly three thousand rupees in spite of the knowledge lies probably in the fact that as the properties mortgaged were very valuable, he took a gambler's chance in the hope that he might be able to get hold of some of the properties in spite of

everything. I hold that the respondent did not act in good faith.

46. My conclusion, therefore, is that the respondent is not entitled to the protection of S. 41, T.P. Act.

47. The plaintiffs-appellants are, therefore, entitled to obtain the relief they have prayed for viz., declaration of title and delivery of joint possession to the extent of eight annas for all the properties purchased by them, including, the mouzas which the respondents purchased in the mortgage sale.

48. Accordingly, I would allow the appeal with costs, set aside the decree of the lower appellate Court, and restore the decree of the trial Court.

49. The cross-objection was not pressed and is dismissed without costs.

P.N. Mitra, J.

50. I agree.