

(1936) 01 CAL CK 0039
In the Calcutta High Court

Dharani Mohan Roy

APPELLANT

Vs

Pramatha Nath Roy and Another

RESPONDENT

Date of Decision : 10-01-1936

Acts Referred:

Transfer of Property Act, 1882 — Section 78

Citation : AIR 1936 Cal 283 : 165 Ind. Cas. 332

Judgement

1. This appeal has merged out of a suit for enforcement of an equitable mortgage. The plaintiff Dharani Mohan Roy is the appellant. On 15th August 1919 plaintiff's adoptive mother purchased from defendant 2, Khitipati Roy, a property known as Ayma Roy Chak subject to an agreement that the price to be paid would be ascertained within a year, and" on that basis executed a promissory note in favour of the latter for Rs. 50,000. On 27th August 1919, Khitipati borrowed from one Mohendra Nath Kundu a sum of Rs. 25,000 on executing a pro note for the amount and depositing certain securities and title deeds in respect of some properties amongst which were premises No. Section 25 and 26 Joy Kissen Street in Uttarpara in the District of Hooghly. These promises will hereafter be called the Uttarpara property. On 8th September 1919, Khitipati endorsed over the promissory note of 15th August 1919 in favour of Mohendra and Mohendra returned to him some of the securities which he had previously taken. In 1922 two suits were instituted on the Original Side of this Court. One was a suit by Mohendra against Kbitipati, and the plaintiff on the promissory note dated 27th August 1919, in which Mohendra prayed for a money decree against Khitipati reserving his right to enforce the security created by the deposit of the title deeds. Pending the suit Mohendra on 5th July 1923 executed a deed of assignment in favour of the plaintiff.

2. It is said that this assignment was in respect of the promissory note as well as the mortgage. On the strength of this assignment the plaintiff got himself transferred to the category of plaintiff in the aforesaid suit in the place of Mohendra and went on with the trial. Later on, on 19th July 1923, the plaintiff obtained a decree against Khitipati for Rs. 34 thousand odd. The other suit was

by Khitipati against the plaintiff on the basis of the promissory note dated 15th August 1919. Pending the trial of this suit, the execution of the decree which the plaintiff had obtained against Khitipati as aforesaid was stayed. In this suit, as appears from para. 9 of the plaint in the present suit, the value of the property Ayma Roy Chak which the plaintiff's adoptive mother had purchased from Kitipati was found to be Rs. 23,800. This suit had not been finally disposed of at the date when the present suit was instituted and it has since then come to an end by a decree passed on 17th February 1930. On 11th July 1929 the plaintiff instituted the present suit. He based his claim under the assignment dated 5th July 1923 and prayed for a decree declaring him entitled to enforce the equitable mortgage in Mohendra's favour dated 27th August 1919, in respect of which he had become the assignee. He sought to enforce that mortgage against the properties amongst which were the Uttarpara properties, and he claimed that the said equitable mortgage should be enforced to the extent of the amount which would be found due to him under the decree he had obtained against Khitipati deducting therefrom the amount of the decree which Khitipati had obtained against him (vide, para. 9 of the plaint). Khitipati was impleaded as defendant 2 in this suit. Defendant 1 in the suit was Kumar Pramatha Nath Roy and he was impleaded as defendant for the following reason.

3. On 20th November 1926 and 17th December 1926, Khitipati and his son borrowed Rs. 2,300 and Rs. 1,200 from the Bengal Central Bank by depositing the title deeds of the Uttarpara property, the very same title deeds which had been deposited by Khitipati with Mohendra on 27th August 1919. On 17th December 1927, Khitipati in order to pay off the amounts due to the Bengal Central Bank on the loans aforesaid executed a simple mortgage bond in favour of defendant 1, Kumar Pramatha Nath Roy, and the title deeds of the Uttarpara property were produced and made over to the said defendant 1. On 18th July 1928, defendant 1 had instituted a suit on the said mortgage and on 27th September 1928 he had obtained a final decree thereon. It may be mentioned here that during the pendency of the present suit, the plaintiff obtained an injunction restraining the execution of the decree which defendant 1 had obtained as aforesaid. The contesting defendant in the suit was defendant 1. Various defences were taken on his behalf. Amongst them the one that was found in his favour was that his mortgage, though later in date, was to have priority over the equitable mortgage which the plaintiff sought to enforce. This defence having succeeded, a decree on that basis was made by the Court below and from that decree the plaintiff has preferred the present appeal. So far as the aforesaid defence is concerned, the Judge of the Court below has dealt with it on a view of the law which he has expressed in these words:

The question of postponement raises the question as to whether Kumar Pramatha was induced to advance money to Khitipati on the security of the mortgage property due to gross neglect of Dharani Mohan Roy. This provision is made in Section 78, Transfer of Property Act; it is an exception to the general rule that a prior mortgage takes precedence over a later one. In this case we are

not asked to decide if the other elements of fraud or mis-representations which are similar grounds for postponement do exist. The onus of the issue is on the defendant, who asserts the exception to the general rule. The question of gross neglect is always treated as a question of fact; its determination must depend on the circumstances of each case. It is again conceded that a slight neglect or carelessness does not substitute the exception for the general law. As a matter of fact gross neglect must be found and proved.

4. So far as the view of the law is concerned, no exception is taken to it on behalf of the appellant, but his contention is that defendant 1, the subsequent mortgagee, has failed to discharge the onus that rests on him in this behalf. In order to see whether this contention is well founded or not we have got to examine the facts. The equitable mortgage in favour of Mohendra was effected on 27th August 1919. In the written statement of defendant 1 it was denied that Khitipati had really deposited the title deeds with Mohendra or had intended to create an equitable mortgage. The Court below has overruled this defence and the conclusion of the Court below on this point has not been challenged before us by either party. In fact it is abundantly clear that Messrs. B.N. Basu and Co., Solicitors for Mohendra, had taken possession of the title deeds at the time of this equitable mortgage. On 14th September 1919 as appears from a receipt Ex. 3 (a) purporting to have been granted by Mohendra himself the title deeds passed from the custody of Messrs. B.A. Basu & Co to Mohendra. This fact also cannot be and has not been disputed before us. On 9th August 1922 Mohendra instituted his suit on the Original Side of this Court. It appears from the evidence of Mr. J.N. Basu of Messrs B.N. Basu & Co., that the title deeds came back to the office of Messrs. B.N. Basu & Co., at or about the time when Mohendra's suit was instituted and thereafter they remained there. On 5th July 1923 the deed of assignment was executed by Mohendra in favour of the plaintiff This deed is not very happily worded but it is fairly clear from its terms that the assignment which it purported to create was in respect of all interests of Mohendra. That is to say, not merely in respect of his interest in the promissory note on which the suit was founded but also of his right as mortgagee under the equitable mortgage. The deed contains no schedule of documents ; but on this no conclusion can be built because in English documents it is not customary to put the schedule of the title deeds that are made to the person in whose favour they are executed.

5. The plaintiff's case is that on 7th July 1923, Messrs. B.N. Basu & Co., made over to his solicitors, Messrs Kally Nath Mitter and Sarbadhikary the title deeds in question. On this point evidence of Mr. J.N. Basu is important. It is true that he had no personal knowledge of the matters relating to the title deeds, but his evidence taken in conjunction with a receipt to which reference will presently be made leads reasonably to the inference that the title deeds were as a matter of fact made over to Messrs. Kally Nath Mitter and Sarbadhikary as Solicitors on behalf of the plaintiff. There are certain circumstances to which the learned Judge of the Court below has adverted and which apparently throw some doubt as regards the nature of the transaction relating to the granting of this receipt. In

the first place the receipt, as has been deposed to by Mr. J.N. Basu, appears in the hand-writing of a clerk in his office, but that clerk has not been produced for examination. The receipt is on a plain piece of paper without any printed heading of the name, either of the firm of Messrs. B N. Basu & Co., or of Messrs. Kally Nath Mitter and Sarbadhikary. There is also the fact that the signature of Messrs. Kally Nath Mitter and Sarbadhikary as appearing on this receipt is somewhat dissimilar to the other signatures of the same firm that had to be found in some other documents produced in this case. But of this last mentioned fact the explanation may be that it is not always one partner or member of a firm who signs for the firm in the documents. But there is positive evidence of Mr. J N Basu which is, in our opinion, unimpeachable, and which is to the effect that the signature appearing on the receipt is the signature of the firm of Messrs Kally Nath Mitter and Sarbadhikary.

6. It is true that there is no entry in the document delivery book of the firm of Messrs. B N Basu & Co., as regards the making over of these title-deeds. But of this, sufficient explanation is to be found in the evidence of Mr. J.N. Basu himself, and he has said that when delivery takes place outside the office it is not entered in the document delivery book of the office and he has also said that an entry about this matter may be found in the day book. This matter was not pursued any further or cleared up. The onus being in defendant 1, even though the circumstances to which we have referred are present in the case, we are unable to hold that defendant 1 has succeeded in establishing that as a matter of fact the title-deeds were not taken possession of by Messrs Kally Nath Mitter and Sarbadhikary as Solicitors on behalf of the plaintiff, from the firm of Messrs. B.N. Basu & Co. This also is the view which the learned Subordinate Judge has taken. We think he was justified in proceeding on this view in considering the other questions that arise in this case. After 7th July 1923, the next date on which we have any evidence as regards the title-deeds, is 20th November 1926, on which date Khitipati produced them before the Bengal Central Bank in connexion with the first of the two loans he took from them. There is nothing to suggest or explain how Khitipati was able to get hold of the title-deeds in order to enable him to produce them before the Bank for the purpose of raising the loan. The question is whether defendant 1 has succeeded in establishing that there was gross neglect on the part of the plaintiff which made it possible for Khitipati to get the title-deeds into his possession and utilise them in the mortgages that he effected in favour of the Bank and of defendant 1. The plaintiff's case on the point is to be found in para. 8 of the plaint which is in these words:

The said firm of Messrs. Kally Nath Mitter and Sarbadhikary was in charge of all documents on behalf of the present plaintiff, including the original deed of assignment from Mohendra Nath Kundu and the deeds mentioned in Schedule "B" to this plaint which were made over to them by Messrs. B.N. Basu & Co.; Messrs. Kally Nath Mitter and Sarbadhikary did not return the said documents to the plaintiff, and in spite of the best endeavour made by the present plaintiff's Solicitors, Messrs. B.N. Basu & Co., has not been able to get back the said

documents. And the plaintiff suspects some fraud and bad thing in respect of the said documents.

7. The evidence on this point that is to be found in the evidence adduced on behalf of the plaintiff consists of the testimony of three witnesses excluding the evidence of Mr. J.N. Basu which, as already stated, is evidence not given out of any personal knowledge on the part of Mr. Basu himself. P. W. 3 Gopal Chandra Mitter is the Head Clerk of the plaintiff. All that he has said is that the documents had not been received by the plaintiff and that they were not in the plaintiff's sherista. P. W. 6 Suk Lal Mukherjee is the plaintiff's cashier. He has said:

The deed of assignment is not with the plaintiff; latterly through B.N. Basu & Co., Solicitors, for plaintiff tried to get that document but it failed. The delay in trying to get back the assignment is due to the fact it was not thought urgent as the decree in this suit against Khitipati was stayed against execution by the latter's suit against the former for price of Ayma Chak.

8. Assuming that the witness wanted to speak not merely about the deed of assignment but also the title deeds in question, the evidence does not give us any indication as what may be the plaintiff's case on the point, namely, as to how the title deeds went over from the custody of Messrs. Kally Nath Mitter and Sarbadhikary to the possession of Khitipati. The evidence of P. W. 4, Hridoy Krishna Ghose does not take us very far. He simply proves that commencing from June 1928 enquiries were made by him on behalf of the plaintiff in order to find out where the title deeds were and in order to get them back into his custody as solicitor on behalf of the plaintiff. It may be stated here that the suit of defendant 1 on his mortgage was started on 18th July 1928, that is to say, within a very short time after these enquiries commenced and it is not unlikely that in view of the expected suits themselves, enquiries began to be made. A subsequent enquiry no doubt is not a matter of much importance but is not wholly irrelevant on the question of carelessness or otherwise on the part of the plaintiff, a question which we are investigating for the purpose of the present case. We have it on the evidence of D. W. 2 Paresh Chandra Ghose, Solicitor on behalf of defendant 1, that the firm of Messrs Kally Nath Mitter and Sarbadhikary was dissolved sometime in 1923-24 and that thereafter the business of the firm was taken over by one or other of the two firms started separately by the partners, one being the firm of Messrs. K.N. Mitter and Co., and the other the firm of Messrs. Deva Prosad Sarbadhikary. There is also evidence to the effect that there were successive changes of attorneys on the part of the plaintiff, the names of the several firms of Solicitors to which his business was entrusted being the firms in the order named, namely, K.N. Mitter & Co., N.C. Mandal, D. Chakravarty and lastly B.N. Basu & Co. Whether this change of Solicitors was in any particular suit in which the plaintiff was concerned or in the suits generally to which he was connected is a matter which to our mind is not of very great importance.

9. The fact is that these firms successively became his solicitors and from this

fact it is not an unreasonable inference to draw that he was perfectly aware that the old firm of Messrs. Kally Nath Mitter and Sarbadhikary had dissolved. The plaintiff has not examined himself. The evidence which his witnesses have purported to give is evidence which can by no stretch of imagination be taken to have been given with the object of putting forward a plausible explanation as to how the title deeds came out of the possession of his solicitors to that of Khitipati. It appears from a petition dated 17th February, 1931 that Mr. Dwijendra Nath Mitter, solicitor, who upon the evidence, such as it is, appears to have been conducting the firm of Messrs. K.N. Mitter & Co., after the dissolution of the firm of Kally Nath Mitter and Sarbadhikary and Sir Deva Prosad Sarbadhikary himself were cited as witnesses on behalf of the plaintiff. But our attention has been drawn on behalf of defendant 1 to the fact that neither of these two gentlemen was served for the purpose of getting them before the Court to give their evidence. No witness has been produced either from the firm of Mr. N.C. Mandal or Mr. D.C. Chakravarty and indeed no other evidence in any shape or form has been sought to be adduced for the purpose of offering any explanation or throwing any light upon the question. As matters stand, it will have to be taken that after the title deeds were taken possession of by Messrs. Kally Nath Mitter and Sarbadhikary on behalf of the plaintiff and right up to the time when defendant 1's suit was about to be instituted and certainly not earlier than June 1928 no attempt was made on behalf of the plaintiff to enquire about the title deeds or to take any care in respect of them.

10. The question in the circumstances is whether upon the facts as found by us it can be said that the necessary conditions of Section 78, T. P. Act, have been fulfilled so as to entitle the Court to hold that the plaintiff's prior mortgage should be postponed to the subsequent mortgage in favour of defendant 1. These are all the facts relevant on the question we have to consider and on them we have to determine whether a case of gross neglect within the meaning of Section 78, T. P. Act, has been made out or not as against the plaintiff. A commonsense definition of negligence which has been adopted in authorities too numerous to mention is that it consists in the omitting to do something which a reasonable person would do or the doing of something that a reasonable person would not do; in either case, causing unintentionally, some mischief to a third party. To use the well known words of Rolfe, B., gross negligence is ordinary negligence with a vituperative epithet prefixed to it. Gross negligence is a relative term and means the absence of the care that was requisite under the circumstances. And as Montague Smith, J. said in I C P 600, affirmed on appeal *Grill v. General Iron Screw Collier Co.* (1866) I C P 600 the use of the term is only one way of stating that less care is required in some cases than in others. There are some old English decisions in which it was held or at least suggested that where title deeds were delivered to an equitable mortgagee and afterwards, by some unexplained accident, came back into the hands of the mortgagor who deposited them with a third party, upon the latter lay the onus of showing gross negligence on the part of the first Mortgagee, which should not be presumed

merely from the absence of title deeds. In Sir Rash Behari Ghose's Law of Mortgage, Edn. 5, p. 443, two cases are cited on this point: *Allen v. Knight* (1846) 5 Hare 272 On appeal (1881) 16 L J Ch 370 and *Carter v. Carter* (1867) 3 K J 617 English decisions, it should be remembered, are complicated by the distinction that exists between equitable and legal estates and the contest between legal and equitable encumbrances, matters which do not arise under the Indian Law. Apart from this, it may also be noted that *Carter v. Carter* (1867) 3 K J 617 has too often come in for adverse criticism: See e.g., *Pitcher v. Rawlins* (1872) 7 Ch 259

11. In *Allen v. Knight* (1846) 5 Hare 272 On appeal (1881) 16 L J Ch 370 there was no question of negligence at all; and the decision proceeded in the absence of a specific case against the plaintiff (the prior mortgagee) charging him with acts whereby the mortgagor was enabled to commit the fraud; and it was expressly pointed out that no circumstances were raised or stated which, coupled with the fact that the title deeds were not with the plaintiff, would deprive the plaintiff of his right. In *Jones v. Rhind* (1868) 17 W R 1091 in which it was found that by some unexplained means a deed which was evidence of title had found its way into the hands of the mortgagor and the mortgagor had utilised it for effecting a second mortgage, James, V. C observed:

What we have then is that after the deed has got into the possession of the mortgagor, the property which was also in his possession was made the subject of an apparently legal mortgage. Now, I am of opinion that in the absence of any reason why the deed was not given up by the mortgagee but was allowed to remain so many years in his possession, the deed was given back for the purpose of representing to the world that he was absolutely entitled to the property.

12. *Carter v. Carter* (1867) 3 K J 617 and *Allen v. Knight* (1846) 5 Hare 272 On appeal (1881) 16 L J Ch 370 appear to have been cited in the above case. In *Perrin v. Barbery* 4 W N 660 it was held that the absence of the deed prima facie shows negligence on the part of a person who ought to hold them. The presumption of innocence is an ordinary presumption, and if that presumption is applied, it is not unreasonable, in the absence of any evidence that the mortgagor committed theft or some similar offence to assume that the mortgagor got possession of the title deeds by the permission of one or other of the solicitors with whom it may have been at the time, and if that supposition be correct, then the case would go very near the case of *Dowle v. Saunders* (1864) 2 H M 242 in which under similar circumstances the prior mortgagee was postponed to the subsequent one. On the other hand in *Northern Counties of England Fire Insurance Co. v. Whipp* (1884) 26 Ch D 482 Fry, L J on an elaborate examination of the authorities classified them under different heads and observed that negligence in the sense in which it is understood in Common Law, as imparting a duty on the part of one person towards another, is not a term which can at all be applied to a prior mortgagee who owes no duty to others but

to himself in having to keep the title deeds for his own title and for his own security. And in that view he held that a prior legal mortgage cannot be postponed to a subsequent equitable mortgage on the ground of any mere carelessness or want of prudence on the part of the legal mortgagee, but will be so postponed if the legal mortgagee had assisted in or connived at the fraud which led to the creation of the subsequent equitable estate, of which assistance or connivance the omission to use ordinary care in enquiring after or keeping the title deeds may be sufficient evidence, where such conduct cannot otherwise be explained, or where the legal mortgagee has made the mortgagor his agent with authority to raise money, and the security given for raising such money has by misconduct of the agent been represented as the first estate.

13. In *Lloyd's Bank Ltd, v. P.E. Guzdar & Co.* 1930 Cal 22 Page, J., (as he then was) in an elaborate judgment in which all the important decisions bearing on the subject were referred to and discussed, has pointed out why in dealing with a question of priority arising under the law in this country as contained in Section 78, T. P. Act, the decisions of English Courts do not afford a reliable guide. It is too late in the day to contend the gross neglect by itself and apart from fraud and mis-representation would not be a sufficient ground for postponement under that section. Page, J., in the case aforesaid has, in construing the meaning of gross neglect as used in the section, adopted the principles enunciated by Lord Selbourne L. C. in *Dixon v. Muckleston* (1872) 8 Ch 155 at p. 160, namely that a man cannot refuse to abide by the consequences of his wilful and unjustifiable neglect, if by that means he has armed another person with the power of going into the world under false colours Wilful and unjustifiable neglect is certainly something more than mere carelessness or want of prudence. In determining the decree which would satisfy the test of grossness a useful guide may be to adopt the test enunciated by Eve, J., in *Hudston v. Viney* (1921) 1 Ch 98 namely:

It must at least be carelessness of so aggravated a nature as to amount to neglect of precautions which the ordinarily reasonable man would have observed and to indicate an attitude of mental indifference to obvious risks.

14. Upon the facts we have found, we feel no hesitation at all in finding that the plaintiff was guilty of gross neglect, if that expression is to be understood in the light of the test just referred to. Besides, the essence of the mortgage on the basis of which the plaintiff's claim rests is the deposit of the title-deeds with the intention of creating a security on the property to which they relate. Much greater care, therefore, was necessary on the part of the plaintiff in the matter of their custody for his own safety and security, and also to avoid the risk of the mortgagor being able to represent that the property was encumbered merely because there was no document about the transaction which could be traced by an innocent subsequent encumbrancer on search. In our judgment, the principle on which one should proceed in this case is that if the possession of the title deeds is an essential part of the earlier encumbrancer's security then if he having got the title deeds allows them by negligence to be again, without

sufficient reason, in the possession of the mortgagor, he will be postponed to a subsequent encumbrancer to whom they are delivered. To deprive defendant 1 of the benefits of the equitable doctrine contained in Section 78. T. P. Act, it has been contended on behalf of the appellant that the defendant 1 was not a bonafide purchaser without notice but had notice of the prior equitable mortgage. This notice is sought to be attributed to him constructively on the supposition that the searches for prior encumbrances that were made on his behalf were sufficient, and that if they had been more thorough and careful he could have known of the existence of the said prior mortgage. (The judgment then discussed the evidence and proceeded). We must hold that the attempt to affect defendant 1 with constructive notice has failed. The result is that, in our judgment, the appeal fails. It is accordingly dismissed with costs to defendant 1 respondent.