

(1971) 09 CAL CK 0020
In the Calcutta High Court
Case No : A.F.O.D. No. 342 of 1968

Jayanta Mohan Chatterjee

APPELLANT

Vs

Jagat Mohan Chatterjee and Others

RESPONDENT

Date of Decision : 07-09-1971

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27, Order 6 Rule 17
Trusts Act, 1882 — Section 63, 64, 66

Citation : AIR 1972 Cal 88 : (1971) 1 CALLT 146 : 76 CWN 127

Hon'ble Judges : Salil Kumar Datta, J; Murari Mohan Dutt, J

Bench : Division Bench

Advocate : Apurbadhan Mukherjee, Jyotir Lal Das and Ram Sankar Mazumdar, for the Appellant; Pramatha Nath Mitra and Chandra Nath Mukherjee, (for No. 3), for the Respondent

Final Decision : Dismissed

Judgement

Salil Kumar Datta, J.—This appeal is by the plaintiff against a (judgment and decree dismissing his suit. The case of the plaintiff as stated in the plaint is as follows:--

2. The grand-father of the plaintiff, Ramani Mohan Chatterjee (since deceased) left considerable properties in Government Securities, shares of Companies, debts payable by different parties as also landed properties. He left a will with a codicil whereby his two sons, Rajat and Jagat (defendant 1) were given specified annuities during their life time and there were provisions for others also. The trustees appointed by the will were directed to hold the residue of the estate upon trust during the natural life of the said sons and after their death to divide the estate with its accumulations of Income in equal shares amongst his grand sons through the said sons. The trustees were empowered to sell the properties belonging to the estate and invest them under such stocks, funds, shares, securities, landed properties or otherwise as they would think fit. The trustees or their survivors were empowered to appoint new trustees or trustees in place of

deceased or retiring trustee or trustees. The will, which was executed on September 13, 1918, and the codicil were duly probated on March 8, 1919. The executors named in the will duly administered the estate since then till January 28, 1927 and by a deed dated January 29, 1927 new trustees namely Rajat, Jagat and Tapan Mohan, a cousin of Jagat were appointed and all the properties belonging to the estate were assigned to the said new trustees by the said instrument which was registered. Shortly thereafter, Tapan Mohan resigned from the office of the trustees and surviving trustees namely Rajat and Jagat began to administer the estate as such trustees. On or about March 6, 1931 a sum of Rupees 34,000 was withdrawn from the estate account with the Imperial Bank of India now the State Bank of India and was lent to Benoyendra Das and his brothers against the mortgage of premises No. 24-C, South Road, Entally being the suit properties (since known as 24-C and 24-D, Dr. Suresh Sarkar Road) Calcutta. The said mortgage was enforced by Rajat and Jagat by a mortgage suit and in execution of the decree they purchased the suit premises and obtained possession thereof in 1936 or 1937. Thereafter they made various improvements and additions to the said premises with the funds of the trust estate. The plaintiff averred that as the said properties were acquired with the estate funds and improvements made thereon with the same funds, they belonged to the trust estate of Late Ramani Mohan Chatterjee. Rajat and Jagat had no means, having no or small income, to acquire personally such valuable properties which were well worth rupees two and a half lakhs. In or about January 22, 1948 they mortgaged these properties as their personal properties to Hindustan Co-operative Insurance Society Ltd. (Hereinafter referred to as Society) for securing its loan to them for a sum of Rs. 70,000/-, and the Society obtained the mortgage decree in enforcement of the said mortgage in Title Suit No. 171 of 1953. Thereafter the assets of the Society vested in the Life Insurance Corporation of India, the defendant No. 3 herein, hereinafter referred to as the Corporation. The decree had since been put into execution in Title Execution case No. 11 of 1957 of the Seventh Court of the Subordinate Judge at Alipore for realisation of the decretal dues by sale of the suit properties.

3. Under the provisions of the will, Rajat and Jagat had no right to the corpus of the estate and the grandson or grand-sons of the testator were the owners of the estate. Rajat died on April 2, 1958 leaving him surviving his widow, Smt. Jyotsna Devi. defendant No. 2. The plaintiff, the only son Jagat and also the only grandson of Ramani Mohan was entitled to the trust estate including the suit properties subject only to the annuity payable to the defendant No. 1 during his Life time. It was stated that neither Rajat and Jagat had any right to mortgage the suit properties which belonged to the estate of Ramani Mohan Chatterjee and the said properties were not affected by the mortgage created by them nor liable to be sold in execution of the mortgage decree. The plaintiff in or about November, 1957 came to know for the first time about this mortgage and filed a claim case being Miscellaneous Case No. 90 of 1957. Thereafter, on the plaintiff's application this Court which granted the probate, discharged Jagat from further

acting as trustee as aforesaid, and, appointed the plaintiff as the sole trustee by order dated May 28, 1958 and since then the plaintiff had been in possession of the said premises as the sole trustee. The plaintiff filed the suit in the said circumstances for a declaration that the said premises were acquired with the funds of the estate of late Ramani Mohan and as such belonged to his estate and further the mortgage decree obtained by the Society did not affect the said properties which thus were not liable to be sold in execution of the said mortgage decree.

4. The suit was contested only by the Corporation by filing a written statement wherein all material allegations in the plaint were denied. It was averred that the sum of Rupees 34,000/- lent by Rajat and Jagat on March 6, 1931 was out of their own funds and mortgage was taken in their own names. The mortgage suit was filed by them personally, resulting in decree in their favour personally and in the title execution case following the properties were purchased by them in their personal names, in their interest and for their own benefit. Since then they had been in exclusive possession of the properties as their personal properties on assertion of their own title by mutating their names as owners in the Collectorate as also in the Corporation of Calcutta. They also made various improvements to the properties and had been realising rent from tenants ever since to the exclusion of alleged executors and to the knowledge of the plaintiff. There was a further allegation that the plaintiff having allowed Rajat and Jagat to hold out and represent the properties as their own, he was estopped from setting up his own title thereto. It was further averred that the Society was a bona fide transferee mortgagee for; valuable consideration without notice of the trust and accordingly the plaintiff was not entitled to any relief in the suit against the Society or its successor the Corporation. There was an amendment to the written statement whereby it was further averred by way of addition to the original written statement that the Society was a bona fide transferee for consideration without notice, after taking reasonable care to ascertain that the transferors had power to transfer the premises in suit and it acted in good faith as a bona fide mortgagee thereof.

5. The suit was tried on evidence before the learned Judge when parties adduced evidence oral and documentary. The learned Judge on a consideration of materials on record came to the conclusion that the suit properties were acquired by withdrawal from the trust account and they belonged to the trust estate but the mortgagee Society was a bona fide mortgagee without notice of the trust. Accordingly, the suit properties were liable to be sold in execution of the mortgage decree passed against Rajat and Jagat and the plaintiff was not entitled to the declarations prayed for in the suit. As a result the suit was dismissed.

6. Against the said decision the plaintiff preferred this appeal while the Corporation filed a cross-objection challenging the findings of the trial Court that the suit properties belonged to the trust estate. This appeal was filed on

September 18, 1958 and on April 9, 1970 the appellant filed an application under Order 6, Rule 17 of the CPC for amendment of the plaint. The proposed amendment is to the effect that as trustees it was beyond the power and authority of Rajat and Jagat to mortgage the properties to the Society which also thus had no right to enforce the mortgage and accordingly the mortgage decree was not enforceable against the properties. This application is opposed by the Corporation who has filed an affidavit-in-opposition in support to which there is affidavit-in-reply by the appellant.

7. On hearing the learned Advocates and on a consideration of the materials on record, it appears that the parties went to trial on the issue as to whether the properties were acquired from the funds of the trust estate and as such they belonged to the trust and whether the suit properties were affected by the mortgage in favour of the Society and the decree passed in the mortgage suit and thus liable to be sold in execution of the said decree. There was never any issue in the suit as to whether the mortgage was beyond the power and authority of the trustees under the trust and it is to be remembered that the properties were standing in the name of the trustees personally and was dealt with by them as such. The proposed amendment, in our opinion, will practically change the nature and character of the suit raising fresh issues triable on evidence. In these circumstances, we do not think that it would be fair and proper to grant amendment of the plaint prayed for by the appellant at "this belated stage. The application, in the circumstances, is dismissed without any order as to costs.

8. The Corporation has filed on June 24, 1971 an application for admission of additional evidence which is the certified copy of the registered mortgage executed by Rajat and Jagat in favour of the Society dated January 22, 1948 for enforcement of which "the Title Suit No. 171 of 1953 was instituted. There is no reason why such document could not be filed in proper time. But even so the mortgage was referred to in paragraph 8 of the plaint with full particulars and in fact the legality and validity of this mortgage as also the proceeding arising therefrom are the subject-matter of challenge in the suit as also in the appeal before us. In view of the contentions raised by the appellant Corporation as also the argument advanced in opposition by the appellant thereto, it is, in our opinion, necessary for us to consider the provisions of the said document in greater details for enabling us to reach our decision in the appeal. We, therefore, allow this application without cost and direct that the certified copy of the mortgage mentioned above be admitted in evidence dispensing formal proof thereof and marked as Ext. Z as the secondary evidence of the original mortgage which was filed in the said Title Suit No. 171 of 1953 and thus formed inseparable part of its records.

9. Mr. Apurbadhan Mukherjee, the learned Advocate appearing for the appellant, has contended that the Court below has found that the suit properties belonged to the trust estate and that being so the trustee could not treat the properties as

their own. u/s 63 of the Trusts Act, the beneficiary was entitled to follow the properties in the hands of the Society and thereafter of the Corporation and obtain requisite declarations prayed for in the suit. Further Section 64 affords no protection either to the Society or the Corporation as the instant transaction is a mortgage and not a sale and the said section protects only bona fide purchaser in good faith for consideration without notice of the trust. In support, reference was made to the decision in *Sivaswami Iyer v. Thirumu-di Chettiar*, AIR 1930 Mad 405 in which it was held that simple mortgagee could have no protection u/s 64. The reliance was also placed on the decision in AIR 1933 148 (Privy Council) in which it was held that the beneficiaries are entitled to follow up the asset acquired out of trust funds which form the part of such asset and to a charge thereon. Mr. Mukherjee further contended that the onus to establish that the Society was a bona fide transferee without notice of the trust lay entirely on the Corporation. That onus however was not discharged and no director or competent person of the Society or the Corporation came to depose that the Society was such transferee. The only evidence that was given on this issue was by an assistant solicitor of the firm of solicitors who was engaged in the transaction of mortgage and even so it would not appear from such evidence that proper and bona fide enquiry was made by the Society or its solicitors to establish that the Society was a transferee without notice. For all these reasons, Mr. Mukherjee contended that the trial court should have decreed the suit as prayed for.

10. Mr. Pramathanath Mitra, the learned Advocate appearing for the Corporation, contended in support of the cross-objection that the account with the Imperial Bank of India which was withdrawn by Rajat and Jagat at the material date on March 6, 1931 was not a trust account nor the amounts which were transferred to the said account were also from such trust account (Ex. 8). The said account was maintained and operated as the personal account of Rajat and Jagat and not as a trustees and it was also obvious that the personal funds were mixed up with trust funds without any scope for identification (vide deposits of Rs 2,000/- on June 7, 1928, Rs. 500/- on June 14, 1928 from S. B. a/c.) while the account at times was overdrawn. He also drew our attention to the amount of Rs. 34,000/- which was lent to Benoyendra Das and others on the said date was overdrawn in the said account as loan granted by the Bank and not a withdrawal from the funds in credit of the said account and accordingly it could not be said that the amount that was invested in the mortgage was a part of the trust funds. It may be that the said loan was repaid by the realisation of the assets of the trust estate but that did not make the said mortgage a part of the trust asset. If this amount of loan was repaid by the trust fund, the trustees would be guilty of breach of trust only to the beneficiary for such fund misappropriated but the beneficiary will not be entitled to follow the properties. In support, he referred to the observations made in *Lewin* (16th Edition) p. 653 as also to the decision in *Denton v. Davis* (1812) 18 Ves. 499 : 34 E. R. 406 for the proposition that if property is acquired by borrowed money and the loan is repaid by sale proceeds

of estates under the settlement, the purchased lands could not be treated as purchased by the trust money and liable to the trust of the settled estates. Mr. Mitra further contended that the properties were mortgaged to the Society by way of English mortgage which is really a transfer of the legal interest in the property subject to a right of redemption only. Such mortgage as English mortgage was accepted in England as a sale as the terms of the deed would indicate and this conception of English mortgage must be deemed to govern the provisions of Section 64 of our Trust Act which came into force sometime before the Transfer of Property Act though both these statutes are of 1882. Accordingly Mr. Mitra contended that Section 64 covered the instant transaction and as such the beneficiary is not entitled to any relief against such bona fide mortgagee.

11. Mr. Apurbadhan Mukherjee has further submitted, in reply to the contention of Mr. Mitra that the amount invested in mortgage of Benoyendra was out of loan from the Bank, that such amount was granted as a loan to the trustees by the Bank on the security of shares and Government papers which were lodged with the Bank. He referred to the receipts granted by the Bank Ext. 2 as also Ext. 1 and contended that the loan was not a loan simpliciter to the trustees but was one against the security of the trust estate and as such the properties acquired were impressed with the trust.

12. Examining the respective contentions of the parties, it will appear that the account wherefrom the amount of Rs. 34,000/- was withdrawn was opened on February 15, 1927 and on that date a sum of Rs. 2428-15-1 was credited by transfer from the balance of the account of Mohini Mohan Chatterjee, Rajani Mohan Chatterjee, Mohi Mohan Chatterjee, executors of the estate. It would also appear that various amounts were deposited and withdrawn in the said account which stood in the name of Rajat, Jagat and Tapan Mohan in their personal names and not as trustees. It is also in evidence of Tapan Mohan that Rajat and Jagat had really no income, so as to support the deposits in the said account as being their personal income. Nonetheless, the account was opened and operated as the personal account of Rajat and Jagat, Tapan Mohan having retired after a short period. There is no evidence that all the amounts which were credited in the account arose out of the asset or securities of the trust and it may be that the some amounts belonged to Rajat and Jagat personally. It is obvious, therefore, that the trustees mixed up their personal fund though insignificant with the funds of the trust estate. Just immediately before March 6, 1931 a small amount was lying in credit in the same account. On March 6, 1931, a sum of Rs. 2,000/- was deposited and an amount of Rupees 34,000/- was withdrawn from the said account. A dispute was raised by Mr. Mitra but we have no doubt that this amount was invested in the mortgage of the suit properties to secure the loan to Benoyendra and others. On this date, therefore, even assuming the sum of Rs. 2,000/- as belonging to the trust estate of which there is no specific evidence, a sum of about Rs. 31,000/- and odd appears to have been lent by the Bank to Rajat and Jagat personally. Now there is no evidence to indicate that this loan was granted by the Bank to them as trustees against the securities of the

trust estate referred to by Mr. Mukherjee. Even though it may be that the Bank will not advance any amount except against securities, in absence of any specific evidence it could not be said that the loan was against any security of the assets of the trust estate. No evidence was called for from the Bank by the plaintiff to substantiate his case that the mortgage was obtained through a loan secured by the assets of the trust while the plaintiff's case was that Rs. 34,000/- was withdrawn from trust account. In absence of such evidence in respect whereof the onus was with the plaintiff, it could not be said that the loan was accommodated against the assets of the trust estate. It may also be true that this loan was repaid by Rajat and Jagat out of the realisations of the trust estate but that will not make the amount of Rs. 31,000/- or the interest of Rajat and Jagat in the suit properties as mortgagees a part of the trust estate. It was observed in (1812) 18 Ves 499 : 34 ER 406 (supra), approved by Lewin in his "Trust", that-

"It appears, that the defendant borrowed money for this purchase; and he applied part of the money arising from the sale of the settled estates, in paying off part of that debt. That cannot be represented as a purchase made with the trust money; supposing land, purchased with the produce of the trust estate, would have belonged to the trust."

13. There can be no dispute as pointed by the Privy Council in the case of AIR 1933 148 (Privy Council) , pursuant to the doctrine of following the trust fund which has been provided in Section 66 of the Trust Act, that the beneficiary would be entitled to a charge upon the assets in the hand of third parties for the amount of trust fund invested in such assets. In *re Hallet's Estate*, *Knatchbull v. Hallet* (1880) 13 Ch. D 696 (at p. 709) Jessel M. R. observed:--

".....where a trustee has mixed the money with his own, there is this distinction that the cestui que trust or beneficial owner, can no longer elect to take the property, because it is no longer bought with the trust-money simply or purely, but with a mixed fund. He is, however, still entitled to a charge on the property purchased, for the amount of the trust-money laid out in the purchase; and that charge is quite independent of the fact of the amount laid out by the trustee as including all persons in a fiduciary relation....."

14. It is obvious that on the authority of the above decisions, the beneficiary is entitled to a charge on the property bought or acquired out of mixed fund to the extent of trust money applied, however much it may have changed or altered in its nature or character. Accordingly the funds of the trust estate with interest invested in the property remains at all times a charge on such property so acquired. For such declaration before a relief is granted, it has to be ascertained the amount of trust fund that was utilised for the acquisition of the property. The beneficiary is entitled on that basis to relief as provided under Sections 63 and 66 of the Act in view of what has been stated. Before those sections however, are made applicable to the fact of this case, it cannot be said that the trust property has come into hands of a third person inconsistently with the trust except in respect of the amount of the trust assets which could be said on evidence to be

in the credit of the trust estate and invested in assets acquired on the material date that is on March 6, 1931. An action would be lie for such relief but no relief in our opinion, can be granted to the plaintiff in this suit unless the amount of the trust estate invested in the said properties is ascertained in accordance with law and the suit is for declaration of charge on such properties for the said amount and interest thereon if found admissible.

15. The next question for consideration is whether the mortgagee is entitled to any protection u/s 64 of the Act assuming that Section 63 is otherwise applicable. We have noted the contentions of Mr. Mukherjee who relied on provisions of the section which, according to him, is confined only to a case of sale while according to Mr. Mitra it will also apply to a case of English mortgage which is in effect a sale. The proposition that English mortgage is an absolute transfer or sale was not accepted by the Privy Council in the case of AIR 1939 14 (Privy Council) in which it was held that under the Indian law a mortgage of a lease does not amount to a transfer of the whole and absolute interest nor does it create a privity of estate between the lessor and the mortgagee. The decision in Bengal National Bank Ltd. Vs. Janoki Nath Roy and Others, which held that an English mortgage was a transfer of absolute interest subject to equity of redemption was not accepted on the view that the interest which is inconsistent with sale retained by the mortgagor was a legal and not merely equitable interest. Mr. Mitra's contention that English mortgage should be treated as a sale regard being had to the conception of English law at the time when the Trusts Act came into force on March 1, 1882 before the Transfer of Property Act which came into force on July 1, 1882, does not appeal to us and it will not be proper to import the concepts of English law to our law, particularly after the judgment of the Privy Council has referred to above. It will appear that if such interpretation was intended to prevail, as suggested by Mr. Mitra, after the Privy Council's decision there would have been suitable amendments to the Trusts Act in respect of Section 64 for retaining such import.

16. Mr. Mitra further contended that "purchase" in law means acquisition of land by lawful act as opposed to acquisition of title by act of law as devolution of interest by succession, and purchase will include a mortgage. In support he has relied on the definition of purchase in law dictionary which gives the widest connotation to purchase as stated above while according to Mr. Mukherjee the purchase can only mean a transfer of ownership for price and never a mortgage which is not a transfer of ownership. If we turn to the provision of Section 64 of the Trusts Act it will appear that certain trans-frees had been given protection against the provisions of Section 63. Both the sections referred to properties in the hands of a third party and in Sivaswami Iyer's case. AIR 1930 Mad 405 (supra) it was observed that the protection is only with reference to the properties in the hands i. e. possession of the alienee and not to a transfer by way of simple mortgage. In our opinion the word "in the hands of a third party" includes possession of the moveable properties or of the Immovable properties including cases where transfer of title takes place. It is not always co-extensive

with the actual possession but also includes cases where there is transfer of title of properties,

17. Section 64 provides as follows:--

64. "Savings of rights of certain transferees. Nothing in Section 63 entitles the beneficiary to any right in respect of properties in the hands of (a) a transferee in good faith for consideration without having notice of the trust, either when the purchase-money was paid, or when the conveyance was executed, or (b)"

It would appear that the word used is "a transferee" and not a purchaser. It also further provides that transferee must act in good faith in the transaction without any notice of trust either at the point of time when purchase money was paid or when the conveyance was executed. If transferee was intended to mean or be co-extensive with buyer or purchaser, then suitable word would have been used as has been used in Section 92 of the Act. The transferee includes the purchaser as also other transferees of title of properties in transactions like mortgage, or exchange. Such transferee, to be entitled to protection, must act in good faith without notice of trust, either at the time when purchase money was paid which connotes a buyer for price paid or when conveyance was executed which connotes other transferees. "Conveyance" according to Wharton's "Law Lexicon" is an instrument which transfers property from one person to another and under Law of Property Act, 1925, Section 205, includes mortgage, charge, lease, assent, vesting declaration, and every other assurance of property or any interest therein. Under different statutes in British Law, "conveyance" means any deed which transfers a title in property. In Section 5 of the Transfer of Property Act, 1882, "transfer of property" means an act by which one conveys a property. "Conveyance" defined in Section 2(10) of the Indian Stamp Act, 1899, includes a conveyance on sale and every instrument by which property, whether moveable or immovable, is transferred inter-vivos which is not otherwise specifically provided by Schedule 1 or Schedule 1-A as modified under the Bengal Amendment Act, 1922.

18. Though the Trusts Act came into force in 1882, a few months earlier than the Transfer of Property Act, the word "Conveyance" in Section 64 must be deemed to have such connotation as was in the prevailing British laws as also in effect accepted in the subsequent Indian statutes. It would thus appear that "Conveyance" in Section 64 of the Trusts Act should have such a connotation as including any deed whereby interest in properties is transferred and this interpretation finds support in the use of the word "transferee" instead of "buyer" in the said section. Accordingly we are of opinion that the word "conveyance" in Section 64 includes documents of sale, mortgage, charge, exchange and other transfer of property, so that the protection under that section is available to mortgage with which we are concerned. In *Chartered Bank of India Vs. Imperial Bank of India*, it was held that even if trust receipts created trust, it could not affect the defendant bank who having no notice of them, bona fide gave valuable consideration for the goods pledged (Section 64, Trusts Act).

It would also appear incongruous that while u/s 64, according to the appellant, protection is given to purchasers in good faith without notice while the third party in exchange in similar circumstances would be denied of the protection for no apparent reason and the same will be the position in regard to mortgages.

19. As to the question of notice, the evidence adduced on behalf of the solicitors is not quite satisfactory in regard to the investigation of title of the properties. There is however evidence that the solicitors firm was entrusted with the completion of the transaction and in normal course of events it would be unreasonable to think that the solicitors firm would advise an improper transaction of mortgage in respect of properties which are the subject of the trust. In the requisition on title (ex. M), a specific enquiry was made in regard to the properties as to whether they were subject to trust and the solicitors acting for Rajat and Jagat did not state in their reply to the requisition that there was any trust relating the properties. It would further appear that in declaration that was obtained from Rajat and Jagat, prior to mortgage ext. J, there was a specific declaration by them that the properties are their personal properties. Even if the searches were made it would not indicate that the properties were subject to any trust. The mortgage to Benoyendra Das as also the decree following, the certificates of sale issued by Court Corporation Tax receipts are all in the personal names of Rajat and Jagat. It would, therefore, appear that there could not be notice of any trust in the said circumstances and to impute the knowledge of a trust on the Society from the statement of account would be beyond reasonable scope of enquiry. For all these reasons, we are of opinion that the Society at the time of execution of the mortgage deed acted in good faith and without any knowledge of the trust and is therefore entitled to protection u/s 64 of the Act.

20. The appeal accordingly fails and is dismissed with costs. The cross-objection in the view we have taken succeeds to the extent that the property was not acquired out of the trust fund nor formed part of trust estate and the finding in the judgment contrary thereto is set aside. There would be however no order as to costs in the cross-objection.

Murari Mohan Dutt, J.

21. I agree.