

(1939) 08 CAL CK 0036
In the Calcutta High Court

Jnanendra Nath Roy and Another

APPELLANT

Vs

Sashi Mukhi Debya and Others

RESPONDENT

Date of Decision : 25-08-1939

Acts Referred:

Transfer of Property Act, 1882 — Section 100, 3, 60, 82

Citation : AIR 1940 Cal 60

Hon'ble Judges : Edgley, J

Bench : Division Bench

Judgement

Edgley, J.—Defendants 22 and 23, Jnanendra Nath Roy and Madhu Sudan Bagchi, are the appellants in this case. They purchased the property which is the subject-matter of this appeal at a sale held on 10th July 1935, and the appeal arises with reference to a suit instituted by the plaintiff, Sashi Mukhi Debya, for the purpose of recovering arrears of maintenance for the period from Sravan 1339 to Bhadra 1342 B.S. at the rate of Rs. 18 (rupees eighteen only) per mensem. Her case is to the effect that her maintenance at the amount claimed is charged on certain properties under an ekrarnama, dated 11th March 1296, corresponding to 23rd January 1890. It appears that the property which was the subject-matter of this ekrarnama originally belonged to three brothers, Jadav Chandra Roy, Satish Chandra Roy and Purna Chandra Roy, The latter died in 1289 B.S. corresponding to 1882 and the plaintiff, Sashi Mukhi, is his widow. Defendants 1 to 8 are the successors-in-interest of Jadav and Satish and the other defendants are people who at various times have acquired some interest in the disputed property. The plaintiff's case is that, after the death of her husband, she surrendered her one-third share of the estate in favour of Jadav and Satish who executed in her favour the ekrarnama mentioned above and thereby agreed to pay her maintenance at the rate of Rs. 18 per mensem, which sum would be charged on the properties mentioned in the schedule to the ekrarnama, which has been reproduced as schedule Ka attached to the plaint. The plaintiff instituted a previous suit for the recovery of the arrears of maintenance due to her under the terms of the ekrarnama. This suit was

numbered as Suit No. 1070 of 1932. She obtained a decree in that suit and, in execution of that decree, the charged property was put up to sale and was purchased, as already stated, by defendants 22 and 23 on 10th July 1935. She contends that these defendants after their purchase must hold the property in suit subject to the charge in her favour.

2. The case for the defendants in the Courts below was to the effect that the property, which was purchased by them on 10th July 1935, was not sold subject to a charge and they maintained that the fact of the existence of any charge was not mentioned in the sale proclamation. They therefore maintained that, if any charge ever existed, as alleged by the plaintiff, this charge was not available against them. They further contended that, in any event, by reason of the execution sale, the charge was extinguished. The first Court held that, although a charge had been created under the ekrarnama, dated 23rd January 1890, this charge could not be enforced against defendants 22 and 23 because the property had been sold free of the charge at the execution sale which was held on 10th July 1935. The learned Munsif therefore dismissed the plaintiff's suit as against defendants 22 and 23, but he allowed her a money decree against defendants 1 to 8. On appeal by the plaintiff the learned Subordinate Judge remanded the case to the first Court for the trial of certain issues. On 30th May 1937 the learned Munsif came to a finding to the effect that defendants 22 and 23 had no knowledge of the existence of any charge at the date of their purchase of the property and held that the plaintiff was estopped, from setting up the charge. On 3rd June 1937 the lower Appellate Court decreed the plaintiff's suit against defendants 22 and 23 mainly on the ground that these defendants must be held to have had knowledge of the existence of the charge at the time when they purchased the property on 10th July 1935.

3. Having regard to the terms of the ekrarnama which was executed by Jadav Chandra Roy and Satish Chandra Roy on 23rd January 1890 in favour of the plaintiff-respondent in this case there can be no doubt that the maintenance of this lady was secured for her life by charging eleven items of property which were mentioned in the schedule attached to the ekrarnama. According to the recitals contained in this document the executants agreed to pay Sashi Mukhi for her life the sum of Rs. 216 per annum at the rate of Rs. 18 per mensem. It was stated that on failure to pay the monthly allowance, Sashi Mukhi would be at liberty to realize the sum due to her by obtaining a decree and putting the charged properties to sale. It was further stated that the person in possession of these properties for the time being would be bound to pay the monthly allowance and, if he failed to do so, it might be realized according to the ordinary process of law. There was a further clause to the effect that the executants of the ekrarnama would be personally liable for the amount due for the maintenance of Sashi Mukhi in case the charged properties were sold in auction or otherwise became unavailable as security for the maintenance. In view of the contents of this document there can be no doubt that a charge was created in favour of Sashi Mukhi within the meaning of Section 100, T.P. Act, and having regard to

the provisions of this Section, it follows that the charge can be enforced against the appellants who are transferees for consideration provided it can be shown that they had notice of the charge. The main point therefore for consideration in connexion with this appeal is whether or not the disputed property was sold to the appellants with notice of the charge in favour of Sashi Mukhi. It has however been urged on behalf of the appellants that irrespective of the question whether the appellants had notice of the charge, it should be held that any preexisting charge was extinguished by virtue of the execution sale which took place on 10th July 1935. In support of this contention, the learned advocate for the appellants places considerable reliance upon the provisions of Order 34, Rule 4, Civil P.C., and on the general principle that at a mortgage sale, the auction-purchaser takes the security free of the mortgage. He therefore asks that the same principle should be applied in a case in which property is sold which is subject to a charge. It is true that under Order 34, Rule 15, Civil P.C. it is provided that all the provisions contained in the order which apply to a simple mortgage shall, so far as may be, apply to a charge within the meaning of Section 100, T.P. Act. As pointed out however in *Matlub Hasan and Others Vs. Mt. Kalawati and Others*, it must be borne in mind that a charge is not exactly identical with a mortgage, and although a similar remedy is available, a suit for the enforcement of a charge is not necessarily the same as a suit for sale on the basis of a mortgage deed. The principle for which the learned advocate for the appellants contends might possibly apply in the case of a single charge because, by reason of the sale, all dues on the charge would usually be liquidated either by the sale proceeds or by means of a personal decree under Order 34, Rule 6, Civil P.C. In the case of a recurring charge however, even although the charged property might be sold in execution of a decree for arrears payable in respect of the sum charged, the liability in respect of future payments would ordinarily remain after the sale and would not be extinguished by the sale of the charged property in satisfaction of a decree for arrears which might have already accrued. In such a case the charge will not be extinguished by the sale and, as a charge is attached to the property charged, the auction-purchaser would ordinarily get the purchased property subject to the charge. I am therefore not prepared to accept this argument which has been put forward on behalf of the appellants and I must hold that the charge in this case was not extinguished by the sale which took place on 10th July 1935.

4. It is next contended that, in any event, the plaintiff must be regarded as estopped by her own conduct from setting up a charge in her favour as she did not disclose this charge in the sale proclamation. The latter document has been exhibited in the suit out of which this appeal arises and is marked Ex. A. It shows that, in fact, there is no mention therein of the property being subject to any charge. In these circumstances, if it could be shown that the plaintiff had deliberately waived her right in respect of the charge and put the property] up to sale free of the charge, there is no| doubt that she would be estopped by her own conduct from pleading a charge at any subsequent time. The general law with regard to this question has been concisely stated in *Manik Ram v. Ram*

Autar A.I.R.(1918) Oud 1. In that case the learned Judicial Commissioner made the following observations:

It is sufficient in my opinion to raise an estoppel if it is shown, as in the present case, that a person, who has an interest in the property sought to be sold in execution of the decree and who has had an opportunity of having that interest proclaimed before the property is brought to sale, has deliberately omitted to ask the Court to have it notified for the information of the intending purchasers. It would be in the highest degree inequitable to allow a person in this position to turn round after wards as against the purchaser and defeat the interest which the latter has acquired, by setting up a previous interest of his own.

5. In the case with which we are now dealing however the circumstances are somewhat peculiar. In the application for execution the fact was clearly mentioned that the property was charged, against which it was proposed to execute the decree. There were also some other words in this application for execution which defined even more precisely the exact nature of the charge, but it is suggested on behalf of the appellants that these words were interpolated after the sale. A similar suggestion is made with regard to certain words which appear in a verified petition filed in Court before the sale. The learned Subordinate Judge has come to no express finding on the question whether these words were subsequently interpolated or not, but there is, at any rate, no doubt that in the application for execution itself attention was drawn to the fact that the properties mentioned in the application were charged properties. This being the case, in the ordinary course of events, one would have expected some mention of the charge to have been made in the sale proclamation, but this was not done. The reason for this omission is obscure, but, in this connexion, it must be remembered that, in view of the language of Order 21, Rule 66, Civil P.C. some responsibility attaches to the Court itself for the purpose of ensuring that the sale proclamation contains the necessary details. A similar case to that which we are now considering came before the Allahabad High Court in 1921 in *Ram Sarup v. Bharat Singh* A.I.R.(1921) All. In that case the plaintiffs were mortgagees and they applied for the sale of certain property of the judgment-debtor and expressly mentioned in their application for execution that this property was subject to their mortgage. For some reason unconnected with any action or statement of the plain, tiffs the mortgage was not notified in the sale proclamation, but it was held that the plaintiffs were not thereby precluded from subsequently enforcing their mortgage against the auction-purchaser. In the judgment in that case the learned Judges referred to the case in *Nursing Narain Singh v. Roghoobur Singh* (1884) 10 Cal. 609, but they pointed out that that case was distinguishable in view of the fact that the application for execution did not make mention of the mortgage.

6. Having regard to the facts found in the judgment of the lower Appellate Court in the case with which we are now dealing it would appear that the omission to mention the charge in the sale proclamation was more likely due to an omission

on the part of some officer of the Court than to any deliberate omission on the part of the plaintiff. This being the case, I am of opinion that the plaintiff should not be held to be estopped by her own conduct from setting up the charge. In any event, however, even if it be assumed that the omission to mention the charge in the sale proclamation was due to the negligence of the plaintiff, the defendants would not be in a position to take advantage of this fact if it could be shown that they had notice of the charge. The law with regard to this point has been stated by Wilson J., in *Nursing Narain Singh v. Roghoobur Singh* (1884) 10 Cal. 609, *supra*:

The law, it appears to us, has long been settled on this matter; that one who has caused the property of his judgment-debtor to be sold in execution cannot afterwards set up any claim of his own against that property unless he shows that the purchaser purchased with notice of his claim.

7. In this case, however, the findings of the lower Appellate Court are to the effect that the appellants had constructive notice of the charge in favour of Sashi Mukhi. The finding of the learned Subordinate Judge on this point is as follows:

The truth was either known to the defendants or would have been known to them if only a proper investigation had been held or in other words if there had not been a wilful abstention from proper enquiry or search which would have led to the discovery of all facts about the charge, so that the defendants must be held to be affected with notice of all facts.

8. The learned Subordinate Judge has adverted to the fact that the three pleaders who acted on behalf of the appellants in connexion with sale knew that the property had been described as having been charged in the application for execution. He further points out that one of these pleaders, namely Rajendra Kumar Choudhury had acted on behalf of one of the defendants in Suit No. 1070 of 1932 and in connexion with that case all the facts relating to the plaintiff's charge came to his notice. As regards Rajendra Kumar Choudhury it has been argued by the learned advocate for the appellants that it cannot be said that he had notice of the charge while acting on behalf of his client within the meaning of Explan. III to Section 3, T.P. Act, which is in the following terms:

A person shall be deemed to have had notice of any fact if his agent acquires notice thereof whilst acting on his behalf in the course of business to which that fact is material.

9. I am not however prepared to accept this argument. Rajendra Kumar Choudhury certainly had notice of the fact of the charge when he scrutinized the record on behalf of defendant 22 and he noticed that these properties were described as charged properties in the application for execution. This fact alone was sufficient to put him on enquiry and if he had even attempted to make such an enquiry he would certainly have remembered all the facts relating to the charge which as found by the lower Appellate Court came to his notice in connexion with Suit No. 1070 of 1932. In my view, the defendants in this case

must be held to have had notice of the charge having regard to the language of the relevant portion of Section 3, T.P. Act, which is as follows:

A person is said to have "notice" of a fact when he actually knows that, or when, but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it.

10. I am therefore in entire agreement with the conclusions at which the learned Subordinate Judge has arrived with regard to this point. In my view, the circumstances clearly show that the fact of the charge was known either to the appellants or their agents, but they deliberately tried to take advantage of the omission to mention the charge in the sale proclamation in order that they might obtain the disputed property free of the charge created by the ekrarnama dated 23rd January 1890. It is however argued on behalf of the appellants that, in any event, it should be held that the property which passed to the defendants was the property described in the sale certificate. In this connexion however the sale certificate is not in evidence, but even if it be assumed that the sale certificate did not mention any charge in connexion with the property in suit the circumstances are such that the appellants will not be entitled to take advantage of the misdescription of the property in the sale proclamation and they must be deemed to have purchased this property subject to the charge.

11. The next point urged on behalf of the appellants is that the amount of maintenance due to the plaintiff should be apportioned and that they should only be held liable for the maintenance in proportion to the value of the property which has actually come into their hands. Admittedly one item of the charged property, item 11 has now been declared free of the charge by reason of the decision of this Court in *Serajganj Loan Office Co. Ltd. Vs. Sasimukhi Debi and Others*, and it appears that this particular item of property has not come into the hands of the appellants. It is also suggested that they have not been able to obtain possession of item 8 of the ekrarnama, but with regard to the latter property the evidence on this point is by no means convincing. It is argued that, as item 11 is not in the hands of the appellants, it would be inequitable to charge the remaining properties which were purchased by them with the full amount of the maintenance due to Sashi Mukhi. In support of his plea for apportionment the learned advocate for the appellants places particular reliance on the cases in *Hari Kissen Bhagat v. Veliat Hossain* (1903) 30 Cal. 755 and *Imam Ali v. Baij Nath Ram Sahu* (1906) 33 Cal. 613. Those cases however appear to relate to instances in which certain portions of the mortgage security had been released by the mortgagee. The general principle with regard to mortgages is that the security must be regarded as indivisible and it is pointed out by the learned advocate for the respondent that Section 60, T.P. Act, provides that a person interested in a share only of the mortgaged property will not be entitled to redeem his share only except where a mortgagee, or, if there are more mortgagees than one, all such mortgagees has or have acquired in whole or part the share of a mortgagor. If in the present case Sashi Mukhi in her capacity as

charge-holder had herself done anything to release any of the charged properties from the charge it might have been argued, on the analogy of the ordinary provisions of law relating to mortgages, that the defendants would only be liable to her as regards her maintenance in respect of a sum to be apportioned proportionately to the value of the property purchased by them. As things stand however Sashi Mukhi is clearly entitled to realize her maintenance from the property which has actually come into the hands of the defendants. In this connexion, the learned advocate for the appellants places some reliance upon the provisions of Section 82, T.P. Act. This Section appears however to provide for contribution inter se by the mortgagors. It is of course possible in the present case that, in view of the principles laid down in Section 82, T.P. Act, the appellants may have some right to obtain contribution from certain other persons interested in some portions of the charged properties, but this is not a matter with which we are concerned in the present appeal. I am therefore of opinion that this contention on behalf of the appellants must fail. It was faintly urged on behalf of the appellants that they should, in any event, only be held liable with effect from the date of their purchase. I cannot however accept this argument because having regard to the terms of the ekrarnama, dated 23rd January 1890, the charge clearly attaches to the properties mentioned in the schedule to that document and the persons in possession of that property are liable in respect of the charge. Finally, it has been suggested that the Courts below should have observed the ordinary procedure in mortgage suits in connexion with this matter and should have passed a preliminary decree for sale. This is a point which was not raised in the grounds of appeal to this Court and, in any event, having regard to the observations made by the Judicial Committee of the Privy Council in AIR 1933 143 (Privy Council) , the procedure which has been adopted can only be regarded as an irregularity. In view of the considerations mentioned above, I am of opinion that the decision of the lower Appellate Court is correct. It is therefore affirmed and this appeal is dismissed with costs. Leave to appeal u/s 15, Letters Patent is refused.