

(1926) 04 CAL CK 0027
In the Calcutta High Court

Jogesh Chandra Ash and Another

APPELLANT

Vs

Entaz Ali and Others

RESPONDENT

Date of Decision : 20-04-1926

Acts Referred:

Citation : AIR 1927 Cal 34 : 97 Ind. Cas. 625

Hon'ble Judges : Mukerji, J;Greaves, J

Bench : Full Bench

Judgement

Mukerji, J.—The facts necessary to be set out for the purposes of these four appeals are as follows:

There were four simple mortgages executed by-one Sheikh Ajahar in favour of one Mahananda Ash, - the first dated - October 1901, the second dated - August 1902 which was in respect of some only of the properties covered by the first mortgage, the third dated - October 1903, which was in respect of the same properties as were covered by the second, mortgage, and the fourth dated - April 1908, which, related to such of the properties as were included in the first mortgage but not in the second or the third. Decrees were obtained in respect of the said four mortgages. In those appeals we are not concerned with the decree on the fourth mortgage, which it may be mentioned, has not yet been put into execution. In execution of the decree on the first mortgage the decree-holder put up the mortgaged properties to sale stating that there was no ether incumbrances thereon, and purchased the said properties on the 13th Juno 1921. On the 21th June 1921, the judgment-debtors conveyed such of the properties as were covered by the second and the third mortgages to the respondents and with the money obtained by the said sale the decretal debt was satisfied and the sale in favour of the decree-holder was set aside on the 12th July 1921. The decree-holder then applied for execution of his decrees under the second and the third mortgages. The respondents put in objections to the effect that the properties were advertised for sale with a declaration that there was no other encumbrance on them and the respondents purchased them on the faith of that

declaration and, therefore, the decree-holder was estopped from setting up the encumbrances and proceeding with the execution of the decrees. The Munsif overruled these objections, but the District Judge on appeal has given effect to them and has dismissed the execution cases. The decree-holder has thereupon preferred these appeals.

2. The learned Munsif took the view that a private purchaser from the judgment-debtors of the properties advertised for sale could not with propriety take advantage of the declaration in the sale proclamation and that such a purchaser stood on a different footing from a purchaser at the execution sale. The learned District Judge has dissented from the view taken by the learned Munsif and put it to the test as to whether if the sale had not been set aside, the decree-holder could have sold the self-same properties again in execution of his decrees on his other mortgages. He has held that the sale proclamation contained an express declaration that there was no other encumbrance on the properties, and the respondents bona fide purchased the properties from the judgment-debtors for valuable consideration on the faith of the said declaration. He has applied the principle that if a party having a title to an estate stands by and allows an innocent purchaser to expend money on the estate without giving him notice he would not be permitted in equity to assert that title against such purchaser. He has also relied upon the principle of *Pickard v. Sears* [1887] 6 Ad. & E. 469 that where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things and induces him to act on that belief, so as to alter his own previous position the former is concluded from averring against the latter a different state of things as existing at the same time.

3. Now the test applied by the learned Judge is hardly a test at all for the purchase having been made by the decree-holder himself; it does not stand to reason that he would not put the properties to sale in execution of his other decrees; if the purchase was made by a third party the decree-holder would undoubtedly be estopped and this estoppel of which the execution purchaser may avail himself against the decree-holder, is based on the ground that it was the statutory duty of the decree-holder to notify before the sale all liens on the properties inclusive of those held by himself. It may be remarked here that if the sale for some reason or other fell through there would have been no bar to the decree-holder setting up the encumbrances again and putting the properties up to sale subject to those encumbrances in fresh or further execution proceeding relating to the same decree.

4. In the reasons that the learned District Judge has given for the view that he took I cannot but think that he has mixed up the principles underlying the different kinds of estoppel and has overlooked the cardinal essentials upon which they rest.

5. The estoppel pleaded in this case is to the effect that the decree-holder by declaring in the sale proclamation that there was no other encumbrance misled the respondents into a belief that there was none, that the respondents acted

upon that belief and that, therefore, the decree-holder is estopped from denying the facts that he represented.

6. In *Pickard v. Sears* [1848] 2 Ex. 654 Lord Denman said:

The rule of law is clear, that, where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the time.

7. In *Freeman v. Cooke* [1848] 2 Ex. 654, Parke, B., pointed out that the rule was founded on previous authorities and was stated more broadly by Lord Denman in *Gregg v. Wells* *Gregg v. Wells* (1839) 10 Ad. & E. 90 thus:

That a party, who negligently or culpably stands by and. allows another to contract on the faith...of a fact which he can contradict cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving.

8. He then observed that the rule itself as laid down in *Pickard v. Sears* [1849] 2 Ex. 634 must be considered as established and proceeded to say this:

By the term "wilfully" however, in that rub, we must understand, if not that the party represents that to be true which he knows to be untrue, at least, that ho means his representation to be acted upon, and that it is acted upon accordingly; and if whatever a man"s real meaning may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth.

9. In the case of *Sarat Chandra Dey y. Gopal Chunder Laha* [1893] 20 Cal. 296 their Lordships of the Judicial Committee referring to the passage in *Freeman v. Cooke* [1848] 2 Ex, 354, quoted above, observed that Baron Parka in that case in effect stated that the term "wilfully" used in the previous case of *Pickard v. Sears* [1837] 6 Ad. & E. 469 was really equivalent to "ntentionally." Their Lordships further observed that

as the rule had been modified in England by substituting the word "intentionally" in the rule established for the word "wilfully" which had been previously used, it seems to their Lordships that the term "intentionally" was used in the Evidence Act (1872) for the purpose of declaring the law in India to be precisely that of the law of England.

10. Their Lordships further went on to say:

A person who, by his declaration, act, or omission had caused another to believe a thing to be true and to act upon that belief, must be held to have done so "intentionally" within the meaning of the statute, if a reasonable man would take the representation to be true, and believe it was meant that he should act upon

it. And to this view effect was given in the case of *Cornish v. Abington* [1859] 4 H. & N. 549 and the later cases.

11. In the case before us, then, in the light of the above principle, the question arises whether the respondents have shown that as reasonable men they took the representation to be true and believed that it was meant that they should act upon it. This is the crucial question upon which the estoppel rests, but to this question the attention of the learned Judge does not seem to have been directed. This is a question of fact, but it is open to us in the absence of any finding of the Court below on this question and in view of the admitted features of the case to arrive at a finding of our own in regard to it. So far as the first part of this question is concerned it may be conceded that when the decree-holder in the sale proclamation stated that there was no other encumbrance the respondents had no reason to think that that statement was untrue and that as reasonable men they took the representation as a true one. But can it be said that they as reasonable men believed that it was meant that they should act on the statement? In the first place no representation appears ever to have been made to the respondents by the decree-holder and what was made was meant for persons who intended to purchase at the auction sale, and if the respondents were not such persons they cannot avail themselves of it. In connexion with this point the following passage may usefully be quoted from *Bigelow on Estoppel*, 6th Edition, page 708:

Only the person to whom the representation was made or for whom it was designed can avail himself of it. There has been some drifting indeed from the safe anchorage of this rule, in regard to the point stated, but the better cases hold well to the position.

12. Again at page 709:

A person who receives statements at second hand, not intended for him, clearly has no right to act upon them. Indeed it is equally clear that a mere by-stander who has overheard a statement made to and for another has no better right to act upon it than if it had been communicated without authority to him; and so it has been decided. If, however, the declaration was intended to be general, then, it seems that one who did not hear it, but to whom it was made known directly afterwards, or within the time to be allowed for acting upon it, may act upon it. This should be the limit of the law : more than that would be to make a man responsible for an act not his own or that of his agent.

13. If the respondents were intending purchasers at the execution sale, all that the declaration should have conveyed to them as reasonable men was that for the purposes of the sale to which the proclamation referred there was no other encumbrance on the properties or in other words that the properties were to be sold free from all encumbrances. As soon as the sale took place the purpose of the declaration was over, and it would be most unreasonable to hold that any person who intended to deal with the property in any other way could reasonably

believe that the representation was meant to be acted upon by him in such dealings. That this is the question on which the application of the doctrine rests is also clear from the case of *Pierson v. Altrincham Urban Council* [1917] 86 L.J.K.B. 969.

14. The same result follows from the application of the propositions enunciated by Brett, J., in the case of *Carr v. L. & N.W. Ry.* [1875] 10 C.P. 307 which were approved in *Coventry v. G.E. Ry.* [1883] 11 Q.B.D. 776 and in *Selon v. Lafone* [1887] 19 Q.B.D. 68. In the last mentioned case Lord Esher, M.R. said:

Estoppels may arise on various grounds, all of which the judgment in *Carr v. L. & N.W. Ry.* [1875] 10 C.P. 307 endeavours to state and each of the grounds on which an estoppel may arise, there stated, is intended to be independent and exclusive of the others.

15. Of the four propositions enunciated in that case the first and the fourth have obviously no application. If the representation be taken to have been made to the respondents, then in accordance with the second of the propositions, "the latter have to show that the decree-holder intended that they should act upon it in the matter of the purchase that they made from the judgment-debtors. Or if the conduct of the decree-holder in making such a declaration is relied upon, then in accordance with the third of those propositions the respondents have to show that a reasonable man would take that conduct as meaning that he was to act upon it in making such a purchase.

16. On behalf of the respondents some arguments have been advanced before us, based on the dictum of Lord Romilly in *Briggs v. Jones* [1870] 10 Eq. 92 that a person, however innocent, who puts it in the power of another to deceive and raise money, must take the consequence. But as Lord Selborne has pointed out in *Dixon v. Muckleston* [1873] 8 Ch. 155 it must be something which raises a positive equity against him, upon the principle which in equity as distinct from law is conveniently designated by the term "Estoppel". It is difficult to see how an equity arises in the present case as against the decree-holder and in favour of the respondents. The representation was made for one particular purpose. Even if the judgment-debtors used it for another purpose, of which, however there is no evidence, it is not easy to see how any negligence may be imputed to the decree-holder, or even if there was any negligence on his part, how that negligence was a breach of any duty that he owed to the public or to the respondents.

17. I am, therefore, of opinion that the order passed by the learned District Judge is erroneous. The appeals accordingly are allowed, the order of the learned District Judge set aside and that of the learned Munsif restored with costs in this Court as also in the lower appellate Court. Hearing-fee in this Court will be assessed at one gold mohur in each case.

Greaves, J.

18. I agree.