
(1915) 05 CAL CK 0029
In the Calcutta High Court

Krishna Kumar Nandy

APPELLANT

Vs

Joy Krishna Nandy and Others

RESPONDENT

Date of Decision : 19-05-1915

Acts Referred:

Transfer of Property Act, 1882 — Section 53

Citation : 29 Ind. Cas. 690

Hon'ble Judges : Roe, J; Asutosh Mookerjee, J

Bench : Division Bench

Judgement

1. This is an appeal by the plaintiff in a suit to enforce a mortgage security, which comprised two properties, namely, a parcel of land and a hut on a second parcel. The mortgage was executed by the first defendant in favour of the plaintiff on the 11th October 1909. The second defendant, a creditor of the first defendant, obtained a decree for money against the mortgagor on the 27th August 1909, and in execution of that decree, purchased the hut on the second parcel for a sum of Rs. 50. The present suit has been defended by the purchaser, who has been joined as a party, on the ground that he has acquired an interest in the equity of redemption subsequent to the mortgage. The Court of first instance found that the plaintiff had failed to prove that any money was advanced on the mortgage and consequently dismissed the suit. Upon appeal the Subordinate Judge found that though the consideration for the mortgage was stated to be Rs. 150, the plaintiff had established that a sum of Rs. 10 only was due to him from the mortgagor under a prior mortgage of the 25th March 1909. The second defendant thereupon contended that a decree should not be made in favour of the plaintiff even for this sum together with interest thereon, because the transaction was voidable u/s 53 of the Transfer of Property Act inasmuch as the mortgage had been created with a view to defeat or delay the creditors of the mortgagor. The Subordinate Judge overruled this contention and gave the plaintiff a decree for realization of the mortgage-money by sale of the first property alone. He exempted the second party from the mortgage lien, on the ground that the transaction was void as against the second defendant, who is a

bona fide purchaser at a sale held in execution of a decree of his own against the first defendant. Neither party is satisfied with this decision. The plaintiff has appealed and contended that a decree should have been made against both the properties included in the security. The second defendant has appealed and urged that on the facts found by the Subordinate Judge, no decree should have been made even in respect of the first property.

2. As regards the cross-appeal of the second defendant, we are of opinion that it cannot possibly succeed. The second defendant, as purchaser of the equity of redemption in the hut, is in no way interested in the first property, which still belongs to the mortgagor, he cannot consequently be permitted to impeach the decree for the sale of that property.

3. As regards the appeal of the plaintiff, it has been contended on behalf of the respondents that the Subordinate Judge should have held, on the authority of the decision in *Chidambaram Ghejtaiar v. Sami Iyer* 30 M. 6 : 16 M.L.J. 427 : 1 M.L.T. 351 confirmed on appeal to the Judicial Committee in *Chidambaram Ghejtaiar v. Srinivetsa Sastrial* 23 Ind. Cas. 74 : 20 C.L.J. 57 : 26 M.L.J. 473 : 18 C.W.N. 841:36 M. 227 : 16 M.L.T. 286 : (1914) M.W.N. 754 : 16 Bom. L.R. 783 : 1 L.W. 963 that the mortgage transaction which was voidable u/s 53 of the Transfer of Property Act must be avoided in its entirety and cannot be made the basis of a decree even for such portion of the consideration as is proved to have been passed from the mortgagee to the mortgagor. The case mentioned is clearly distinguishable. The Subordinate Judge has found that the mortgage-bond was executed for an antecedent loan of Rs. 57 and an alleged cash payment of Rs. 93 and that the payment of the cash consideration was doubtful or had not been proved. He has further found that the plaintiff was not, at the date of the mortgage transaction, aware of the decree obtained by the second defendant nor of its impending execution against the first defendant. There is also no evidence to show that there were other creditors of the mortgagor at the time of the mortgage transaction who were intended to be defrauded or defeated. But the Subordinate Judge seems to have held that the intention of the mortgagor was to put a fictitious statement of consideration in the mortgage-bond so that it might be of use to him as against possible creditors at some future time : there is, however, no direct evidence to show that the mortgagee was aware of this fraudulent intention. The facts found by the Subordinate Judge are, consequently, not sufficient to bring the case within the scope of Section 53, as explained by this Court in the cases of *Ishan Chunder Das Sarkar v. Bishu Sirdar* 24 C. 825 : 1 C.W.N. 605 and *Hakim Lal v. Mooshahar Sahu* 34 C. 999 : 6 C.L.J. 410 : 11 C.W.N. 889.

4. But we need not rest our decision on this basis alone. We shall assume, for our present purposes, that the mortgage is within the mischief of Section 53 and that the facts sufficient to justify this conclusion have been found by the Subordinate Judge, still the question arises, what is the relative situation of the parties to this litigation if Section 53 does not render the transaction void : it is

only voidable at the option of any person defrauded, defeated or delayed thereby. Let us assume also, as was done in the case of *Eastern Mortgage Agency Co., Ltd. v. Rebaii Kumar Roy* 3 C.L.J. 260 that the validity of the mortgage can be questioned by way of defence and that it is not obligatory upon the person prejudicially affected to institute an action to avoid the transaction. If these assumptions are made, the inference follows that the second defendant is entitled to question the mortgage, only in so far as it affects the property acquired by him, namely, the hut on the second parcel. But the Court, when it proceeds to grant relief by way of avoidance of the transaction, will do so only on equitable considerations and will apply the principles of justice, equity and good conscience. In the present case, it is plain from the orders in the execution proceedings wherein the second defendant became the purchaser, that he acquired the hut subject to the lien of the plaintiff; consequently, if at his instance the mortgage is avoided, he should be granted relief, only on condition that he satisfied that lien. It follows that the plaintiff is entitled to a decree for his dues as against the second property in the hands of the second defendant. This view is in accord with that taken in the cases of *Eajani Kumar Das v. Gaur Kishore Saha* 35 C. 1051 : 7 C.L.J. 586 : 12 C.W.N. 761 and *Jaladantci Chinna Pitohia, In re* 11 Ind. Cas. 868 : 36 M. 29 : 10 M.L.T. 183; (1911) 2 M.W.N. 152 which recognise the principle that a mortgage can be enforced for so much of the consideration as is proved to have been paid by the mortgagee to the mortgagor.

5. The result is that this appeal is allowed, the cross-objection dismissed and the decree of the Subordinate Judge discharged. There will be a mortgage-decree in favour of the plaintiff against both the properties included in the security. But the decree will direct that the plaintiff must, in the first instance, proceed to realise his dues by sale of the first property. If such sale is not found sufficient to satisfy his dues, he will be entitled to proceed against the second property to recover the balance. As the hut, after purchase by the second defendant, has been demolished and can no longer be brought to sale, the decree will specify the sum recoverable by the plaintiff from the defendant under our judgment. Each party will pay his own costs throughout the litigation.