

**(1957) 09 PAT CK 0016**  
**In the Patna High Court**  
**Case No : A.F.A.D. No. 1199 of 1953**

Manu Pande and Another

APPELLANT

Vs

Mt. Sukhlalia and Others

RESPONDENT

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**Date of Decision :** 26-09-1957

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 2  
Contract Act, 1872 — Section 11  
Evidence Act, 1872 — Section 3  
Transfer of Property Act, 1882 — Section 58

**Citation :** AIR 1958 Patna 79

**Hon'ble Judges :** Kanhaiya Singh, J

**Bench :** Single Bench

**Advocate :** Balbhadra Prasad Singh and Janardan Pd. Singh, for the Appellant;  
H.P. Sinha and P. Jha, for the Respondent

**Final Decision :** Allowed

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## Judgement

Kanhaiya Singh, J.—This is a second appeal by the plaintiff's from the concurrent decisions of the Courts below in suit brought by them for redemption. Shortly put, the facts of the case, omitting those not relevant now, are these. Basmato Kuer, the widow of Parsuram Pandey, executed in favour of the defendant a registered usufructuary mortgage bond dated 16-7-1923 in respect of 2 bighas 6 kathas 12 dhurs of land under khata No. 526 situate in village Chainpore Mubarakpore.

On the death of Basmato Kuer, plaintiff, claiming to be the reversionary heir of Parsuram Pandey, sold the equity of redemption to plaintiff 2 by a registered deed of sale dated 19-7-1945. On 24-7-1948 both the plaintiffs instituted the present suit for redemption of the aforesaid usufructuary mortgage.

2. The defence in the main was that plaintiff 1 was not the next reversioner of the estate of Parsuram Pandey and that the usufructuary mortgage bond was not subsisting, but that it had already been redeemed by the daughters of Basmato

Kuer, namely, Chaita and Phuljharo, by executing in favour of the mortgagee defendant another usufructuary mortgage bond dated 26-5-1931 in respect of a larger area including the mortgaged property.

3. The suit was decreed on 6-5-1949 but on appeal by the defendants there was a remand by the lower appellate Court on 29-9-1951. After remand the learned Munsif held that the plaintiffs were not immediate reversioners of Parsuram Pandey and dismissed the suit on 5-4-1952.

4. The plaintiffs took an appeal from the decision of the learned Munsif and the learned Subordinate Judge held that plaintiff 1 was the preferential heir of Parsuram Pandey and was entitled to inherit his estate. He, however, affirmed the decree of the learned Munsif dismissing the suit on the ground that the first usufructuary mortgage bond was not subsisting and it had already been redeemed by the subsequent one.

5. Mr. Balbhadra Prasad Singh appearing for the appellants contended that the subsequent usufructuary mortgage bond was void and could not operate to redeem the mortgage in suit. It is common ground that Phuljharo Kuer was a minor at the time of the execution of the second usufructuary mortgage bond dated 26-5-1931 (Ext. C). It was executed on her behalf by Kamlapat Mishra, her father-in-law.

The contention of Mr. Singh is that father-in-law is not a natural guardian of his daughter-in-law and consequently the subsequent mortgage was absolutely void so far as the interest of Phuljharo Kuer in the mortgaged property was concerned. He urged that even if this mortgage was valid so far as the interest of Mst. Chaita was concerned, it was wholly ineffective to discharge the previous mortgage fully.

His argument is that the previous mortgage could not be redeemed partially in respect of the share of Chaita and remain operative in respect of the share of Phuljharo Kuer. The effect of these two documents will, it is said, be to bring into existence two usufructuary mortgage bonds in respect of the same property at the same time, which is not permissible in law.

6. In my opinion, the contention of Mr. Singh is well-founded and must prevail. The question for determination is whether the mortgage of 1931 amounted to a redemption of the first mortgage and the answer depends upon whether Kamlapat Mishra could act as guardian of Phuljharo Kuer and make valid transfer of her property.

7. Mr. H. P. Sinha appearing for the respondents conceded that Kamlapat Mishra was not a de jure guardian of Phuljharo Kuer but contended that he was de facto guardian. No such defence was taken by the defendant in his written statement. When the defendant pleaded redemption of the previous mortgage by the subsequent mortgage of 1931 it was necessary for him to plead in the written statement all the matters which will establish its validity. Manifestly, Kamlapat

Mishra was not a natural guardian and any transfer by him of the minor's property by mortgage or sale will not bind the minor.

It was, therefore, essential for the defendant to state how Kamlapat Mishra came to act for and on behalf of Phuljharo Kuer. In other words, he should have stated clearly in the written statement that he was her de facto guardian. This he has not done. Apart from this, a mere averment that Kamlapat Mishra was a de facto guardian is not adequate.

There must be evidence to show that he in fact intermeddled with the estate of the minor or acted as a guardian previously. In absence of such pleading or evidence, Kamla-pat Mishra cannot but be regarded as a self-appointed guardian; he was a guardian ad hoc, and no more. In the circumstances it is difficult to accept the contention of Mr. Sinha that he was a de facto guardian. The contention is without basis and must be overruled.

8. Now the position that emerges is that Phuljharo Kuer was a minor on the date of the second usufructuary mortgage. Kamlapat Mishra adopted the role of a guardian to make the mortgage on her behalf. It is, however, clear that he was neither a natural guardian, nor a de facto guardian, nor a guardian appointed by any Court. He was a self-appointed guardian presumably for this particular transaction.

The rule of law is firmly established that a minor is not competent to make a transfer, and as Kamlapat Mishra had no authority to create a mortgage on her behalf the mortgage bond dated 26-5-1931 (Ext. C) must be held to be a void transaction as against her (Vide AIR 1938 181 (Privy Council) )

9. It follows that the mortgage bond of 1931 was valid only with respect to the share of Chaita Kuer in the mortgaged property. It could not, therefore, operate to redeem the first mortgage bond of 1923 in its entirety. It could not be regarded as redeemed respecting the share of Chaita and unredeemed so far as the share of Phuljharo is concerned.

The result will be that there will be two usufructuary mortgages in respect of the same property. As laid down by a Division Bench of this Court in the case of Ram Narain Lal v. Murli Dhar 5 Pat LJ 644 : (AIR 1920 Pat 67) (B), there cannot be two different usufructuary mortgages on the same land at the same time. It must be held, therefore, that the usufructuary mortgage in suit is still subsisting and has not been redeemed.

10. Mr. Sinha next contended that when the mortgagee accepted the second mortgage in full satisfaction of the previous mortgage, the plaintiffs cannot raise any legitimate objection and claim redemption twice over. This is true, but where a mortgagee accepts another mortgage by a stranger, for instance, Kamlapat Mishra, in satisfaction of a previous mortgage, he cannot thereby jeopardize the interest of the real mortgagor. This contention must be overruled.

11. In the result, it is ordered that the appeal be allowed with costs, the

judgments and decrees of the Courts below be set aside and the suit be decreed with costs throughout.