(1898) 07 CAL CK 0001

In the Calcutta High Court

Case No : Suit No. 345 of 1895

Monindra Chandra Nandy APPELLANT

Vs

Troyluckho Nath Burat and others RESPONDENT

Date of Decision : 25-07-1898

Acts Referred:

Citation : (1898) 07 CAL CK 0001

Judgement

Jenkins, J.—This is a suit to realize mortgage securities and to determine priorities. On the 21st September 1887, Jeeban Kissen Sen advanced the sum of rupees six thousand repayable on the 21st of March 1888 with interest at the rate of 12 per cent, to the Defendant Troyluckho Nath Burat, who by way of security deposited in Calcutta with him the title-deeds of premises known as Nos. 6, 7 and 5/4, Protab Chunder Chatterjee''s Lane. No document was executed at the time, though it is alleged that this omission was opposed to the plan of the parties. Be that however as it may, it is clear that on the 24th of March 1888 Troyluckho Nath executed an agreement creating a charge on the properties which I have named. This agreement was registered on the 19th July 1889. Jeeban Kissen is said to have died, and on the 29th of January 1890 probate was granted to the Defendant Matungini Dasi as his executrix.

2. On the 8th August 1891, Troyluckho Nath mortgaged for rupees fifteen thousand a portion of the, properties comprised in Jeeban Kissen''s charge to the Maharani Surnomoye, who has since died, and is represented by the Plaintiff.

3. On the 25th December 1892, Troyluckho Nath borrowed from the Defendant, Omrao Sing Johury, the sum of rupees four thousand with interest at the rate of 15 per cent, and, as security for repayment, deposited, with him in Calcutta a conveyance, dated the 2nd day of October 1890, whereby Nos. 5/4, 6 and 7, Protab Chunder Chatterjee''s Lane, were expressed to be conveyed to him. Nothing was disclosed to Omrao Sing as to the prior charges on the occasion of his advance, and so the question of priority arises. Though Matungini Dasi''s priority was disputed on the pleadings before me, this point has been abandoned

both by the Plaintiffs and Omrao Sing, and the only question remaining for my decision is as to the priorities of these two.

4. The Plaintiff''s mortgage is the earlier in time, but it is contended by the Defendant Omrao (who I may here state in passing has already obtained a decree against the mortgagor in a suit to which neither the Plaintiffs nor their predecessor were parties) that the priority, to which the Plaintiff might otherwise have been entitled by virtue of the earlier date of their mortgage has been lost by gross negligence on the part of their predecessor. The Plaintiffs, on the other hand, do not admit the gross negligence, and contend that in any case Omrao Sing is in pari delicto. It becomes therefore necessary that I should notice more in detail the facts, on which these rival contentions are based.

5. When the Maharani took her mortgage, Troyluckho Hath, who was her confidential agent in Calcutta, produced for inspection the title deeds of the property, but on the mortgage being executed, these title-deeds, in accordance with a practice which is said to prevail in the mofussil, were returned to the mortgagor and were allowed to remain in his custody. It is clear that Troyluckho Nath Burat was by this means enabled to effect an equitable mortgage in favour of Omrao Sing by deposit of the conveyance of 2nd October 1890. Now there is no suggestion that the title-deeds were returned to Troyluckho Nath with any fraudulent intent or for any other reason than that it was in accordance with the mofussil practice to which I have alluded : it is, however, contended on the part of Omrao Sing that it is through the gross neglect of the Plaintiffs predecessor, that he has bear induced to advance money on the security of the mortgaged property, and that therefore the prior mortgagee should be postponed to him the subsequent mortgagee. It appears, on the other hand, that Omrao Sing never searched the register, did not investigate Troyluckho Nath''s title and did not even insist on any explanation being given as to why the title-deeds (other than the conveyance) were not in Troyluckho Nath''s possession or where they then were, so that the Plaintiff contends that Omrao Sing does not come into Court to seek his equitable relief with clean hands. In this connection reliance has been placed on sec. 3 of the Transfer of Property Act, which provides that a person is said to have notice of a fact when but for wilful abstention from an enquiry or search which he ought to have made or gross negligence, he would have known it. I should here state that, as in the case of the Maharani, there has been no suggestion of fraudulent conduct or motive on the part of Omrao : both alike confided implicitly in Troyluckho Nath''s honesty.

6. I proceed then to consider whether the circumstances of this present case require that the Plaintiff should be postponed. Mr. Sinha, on behalf of Omaro Sing, has relied on sec. 78 of the Transfer of Property Act which is in these terms :--

Where, through the fraud, misrepresentation or gross neglect of a prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee.

7. Inasmuch as fraud and misrepresentation, as distinct from gross neglect, are in no way suggested, I have to consider whether there was in the Maharani''s conduct, or the conduct of her responsible agents, that which can properly be characterised as gross neglect. The Act contains no definition or gross neglect or anything which points to its exact meaning.

8. It is, however, to be borne in mind that the Transfer el" Property Act, which was passed to define and amend certain parts of the law relating to the transfer of property by act of parties, was based, at any rate so far as the provisions now under consideration are concerned, on the principles of equity as established by English decisions.

9. Now the expression "gross negligence" has from early times been in such common use in the Courts of Equity in England as descriptive of the conduct or circumstances, which would induce the Court to postpone a prior mortgagee, as almost to have acquired a distinct meaning, and I think recourse may legitimately be had to those cases as furnishing some guide as to the force of the expression, and to (he dividing line between the degree of negligence which carries with it no prejudicial effect and that which does and is described as gross.

10. Now it is abundantly clear that for more than a century the English Courts of Equity have laid down that the mere omission on the part of a mortgagee to take and keep the title-deeds is not of itself gross negligence or to express it otherwise by its results does not operate to postpone the mortgagee. Thus in Tomb v. Rand 2 Bro. C.C. 652, Lord Thurlow''s judgment on this point is reported as follows :--" He did not conceive that a mortgagee not taking the deeds was alone sufficient to postpone him : if that were so, there would be no such thing as a mortgage of a reversion. The first cases where the prior mortgagee was postponed were cases of fraud : then the same was done in cases of gross negligence.

11. Then there is the leading authority of Evans v. Bicknell 6 Ves. 174, in which Lord Eldon says :--"The doctrine at last is that the mere circumstance of parting with the title-deeds unless there is fraud, concealment or some such purpose or some concurrence in such purpose or that gross negligence that amounts to evidence of a fraudulent intention is not of itself a sufficient ground to postpone the first mortgagee.

12. Almost identical language was used by Lord Eldon in Martinez v. Cooper 2 Russ. 198 where he says there must he either direct fraud or negligence amounting to evidence of fraud to induce this Court to interfere for the purpose of postponing a party.

13. So in Farrow v. Rees 4 Beav. 18, Lord Langdale says:--"No authority has been cited for the proposition that the mere omission to hand over the deeds is in all cases to be deemed a proof of fraud.

14. Again Lord Justice Turner in Hunt v. Elmes 2 DeG. F & J. 578 deals with the question as follows:--"Fraud being out of the case-on both sides, the question depends entirely upon this : whether there was gross or wilful negligence on the part of the Plaintiff the mortgagee in not having possessed himself of the title-deeds it now being well settled by many authorities that a legal mortgagee cannot be postponed by reason of his not having possession of the title-deeds unless there has been fraud or gross and wilful neglect on his part.

15. Instances of similar decisions might be multiplied almost indefinitely. This, however, is unnecessary, and these instances may be taken as typical. I refer of course to these decisions not as being authorities binding this Court in the present case, but as furnishing by way of illustration a useful clue to the meaning attributed to the expression "gross negligence " by Courts of Equity in England at the time when the Transfer of Property Act was passed. I now come to consider whether the Maharani or her agents have been guilty of gross negligence so as to be postponed to Omrao Sing. Prior to the advance Troyluckho Nath produced for the inspection of the Maharani (for I will treat what was done by her agents as having been done by her) the title-deeds relating to the property. They were examined and the title was approved. Then a mortgage was executed and registered, and the title-deeds were returned to the mortgagor under the circumstances to which I have referred.

16. There was, therefore, no omission in the investigation of title and the perfecting of the security, so that this case is clearly differentiated from those, in which an intending mortgagee seeks to gain priority over an existing equity by intentionally omitting to take those steps which might bring it to his notice, conduct which would certainly be a gross neglect pointing almost irresistibly to a fraudulent intent.

17. The existence of gross negligence must be determined according to the circumstances of each case, and one of the circumstances to be taken into consideration here is the fact that in this country a universal system of registration exists. Registration is prescribed by statute, and he, who registers his deed promptly, reaps the reward of his care and diligence in the security and priority he thereby gains.

18. In this particular case the Maharani examined the title-deeds and assured herself of the mortgagor''s title : she further registered her charge and so completed her title in the mode the statute prescribes and thereby at the same time recorded her interest in the property in a way which made its existence clear to any subsequent purchaser or mortgagee who exercised ordinary care and caution. How then can it be said that the Maharani was guilty of such gross negligence as that she should be postponed under sec. 78 of the Transfer of Property Act?

19. Dealing with a cognate question Lord Cairns in Agra Bank Limited v. Barry L.R. 7 H.L. 148 says :--"Has it ever been decided with regard to a register such

as that which prevails in Ireland that negligence in not asking for the title-deeds or not taking up the title-deeds shall postpone the security? I am not going to say a word with regard to the effect of negligence of that kind in a country like England where there is no general registration of deeds and no Act of Parliament like the Irish Act. But I am unable to discover any principle upon which mere negligence and mere failure to take all the securities that might be taken could in a country subject to a law like the Irish Register Act postpone a registered deed. It appears to me that the object of such a statute as the Irish statute is to give a premium to diligence in registration; and to say that if the question is merely a question of greater or less diligence, greater or less care the advantage ensues to the person who shows his diligence by first registering his own deed.

20. No doubt the circumstances of that case differed from those with which I now have to deal, but the Lord Chancellor enunciates a general principle, which furnishes a useful guide on the point, which now calls for my decision. The facts of this case do not lead me to the conclusion that the Maharani was guilty of the gross negligence that the statute requires, and I certainly think that the conduct of Omrao Sing is not such as to create any predominating equity in his favour. The only security he took was a deed of conveyance to the mortgagor : though he had reason to believe there were other title-deeds, he did not examine them or even insist on an explanation as to where they were, and above all he did not even search the register though he was in Calcutta, nor has any reason been afforded in explanation of this omission.

21. On these grounds therefore I hold that the Plaintiffs security is not to be postponed.

22. I have not dealt with the question which was argued before me as to whether or not registration is notice--a point on which there are apparently conflicting decisions in the Courts of the various Presidencies,--for in the view I have taken of this case it has become unnecessary. Apart from authority however, I should have thought having regard to the statutes applicable in this country that the proposition involved is not one of law but of fact, and that as each case arises it should be determined whether in that individual case the omission to search the register taken together with the other facts amounts to such gross negligence as to attract the consequence which results from notice, and it well may be that this test will serve to reconcile the apparent conflict of view that at first sight the cases suggest. There will be the usual mortgage decree, the several mortgagees being entitled in the order of priority I have indicated.

