
(1932) 11 AHC CK 0028
In the Allahabad High Court

Ratan Lal	Vs	APPELLANT
Mukandi Lal and Another		RESPONDENT

Date of Decision : 04-11-1932

Acts Referred:

Transfer of Property Act, 1882 — Section 78

Citation : AIR 1933 All 299

Hon'ble Judges : Iqbal Ahmad, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Iqbal Ahmad, J.—The only question that arises for consideration in the present second appeal is whether the Courts below were right in refusing to extend to the defendant-appellant the benefit of the provisions of Section 78, T.P. Act,. it is provided by that section that 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.

2. In order to invite the application of this section to a given case it is necessary to prove that the fraud, mis-representation or gross neglect of the prior mortgagee was the proximate cause for the advance of money by the subsequent mortgagee. If the fraud, misrepresentation or gross neglect of the prior mortgagee is not the proximate and primary cause but only one of various contributory factors that led the subsequent mortgagee to advance money, Section 78 can have no application. In the present case the Courts below, while holding that the plaintiffs-respondents were guilty of gross negligence in not ascertaining the exact description of the mortgaged property by a reference to entries in the khewat and in getting the same correctly described in the mortgage-deed in their favour, also held that the defendant-appellant was equally guilty of gross negligence in omitting to inspect the title deed of the mortgagor of which he had ample notice, and an inspection of which would have

given him notice of the plaintiffs' mortgage. On these findings the Courts below held that as the negligence of the defendant-appellant contributed to the loss that now he has to suffer by being postponed to the plaintiffs, the defendant-appellant is not entitled to the benefit of the provisions of Section 78, T.P. Act. It is well established that a party who himself has been negligent cannot burden another with the consequence of his own negligence, or as has been said:

that the argument of negligence against negligence, like that of estoppel against estoppel, sets the matter at large.

3. In the present case therefore if the finding of the Courts below as regards the contributory negligence of the defendant-appellant is upheld the decrees of the Courts below must be affirmed. The property sought to be sold in enforcement of their mortgage by the plaintiffs belonged to a lady named Mt. Roshni. It was situate in two mahals, viz., mahal Surkh Ahtamali and mahal Surkh Mustahkam. The total area of the share belonging to Mt. Roshni was 36 bighas and 14 biswas and the entire share was entered in khata khewat No. 2. Mt. Roshni gifted the said property to Chunni Singh on 20th March 1922, by means of a registered deed of gift. In the deed of gift by mistake the property was described as being situate in khata khewat No. 1. Chunni Singh mortgaged the property gifted to him to a man called Mutsaddi Lal by means of a deed of simple mortgage dated 18th August 1922. In the mortgage-deed the mistake that had crept in the deed of gift as regards the description of the property was reiterated. In other words the property mortgaged to Mutsaddi Lal was described as property in khata khewat No. 1. The mortgage in suit was executed by Chunni Singh in favour of the plaintiffs on 13th June 1923. In the mortgage in suit the property mortgaged was again misdescribed as being in khata khewat No. 1. The money due to Mutsaddi Lal on the basis of the mortgage of 1922 was left by the mortgagor with the plaintiffs and the plaintiffs paid that amount to Mutsaddi Lal and redeemed his mortgage.

4. The defendant-appellant obtained a mortgage-deed from Chunni Singh on 5th July 1929. In the mortgage-deed the property mortgaged was correctly described as the share of the mortgagor in khata khewat No. 2. The plaintiffs alleged that the property that was intended to be gifted to Chunni Singh and to be mortgaged to them was the property belonging to Mt. Roshni in khata khewat No. 2, and the property was by mere inadvertence misdescribed both in the deed of gift and in the mortgage-deed as being situate in khata khewat No. 1. They therefore prayed for sale of the mortgagor's share in khata khewat No. 2. The defendant-appellant resisted the suit on the allegation that he had advanced money under good faith, being under the belief that the property in khata khewat No. 2 was free from incumbrance and therefore his mortgage had priority over that of the plaintiffs' mortgage.

5. It is common ground that the property that Chunni Singh intended to mortgage to the plaintiffs was the property in khata khewat No. 2, and that as a matter of fact he had no share in khata khewat No. 1. It has also been found by

the Courts below, and no exception is taken to this finding, that the plaintiffs before advancing money under the mortgage in suit inspected the deed of gift which was the title deed of their mortgagor. The plaintiffs however did not examine the entries in the khewat. The Courts below were of the opinion that the plaintiffs' omission to do so amounted to gross neglect on their part. With this conclusion we are unable to agree. There may be cases in which an omission to examine the entries in the revenue papers may constitute gross neglect on the part of an intending mortgagee; but in the present case we are not prepared to hold that the plaintiffs' failure to look into the entries in the khewat constituted gross neglect on their part. Each case must be decided on its own facts and circumstances and it is impossible to lay down any general rule of universal application with respect to what may or may not constitute gross neglect on the part of an intending mortgagee. In the present case the property was described as being situate in khata khewat No. 1 in the deed of gift executed by Mt. Roshni. It was so described in the deed of mortgage in favour of Mutsaddi Lal. Both documents were registered. They were of comparatively recent years.

6. The plaintiffs-respondents therefore could have no reason to suspect the accuracy of the description of the property in those deeds and, though it may be affirmed that it would have been more prudent for the plaintiffs not [to rest content with an examination of the deed of gift, it cannot be ascertained that the plaintiffs' omission to do so constituted gross neglect within the meaning of Section 87, T.P. Act. If gross neglect on the part of the plaintiffs is not established Section 78 obviously can have no application to the case. In the view therefore that we take the question whether the defendant was or was not guilty of contributory negligence does not arise. We however are in agreement with the Courts below in holding that the proximate cause of the alleged injury to the defendant was not gross neglect on the part of the plaintiffs but negligence on the part of the defendant himself. The deed of gift is mentioned in the mortgage-deed in favour of the defendant-appellant. The defendant-appellant did not admittedly examine the deed of gift. In other words, the defendant-appellant failed to examine the title deed of his mortgagor. If he had examined the same he would have found that the property gifted to Chunni Singh was described in that deed as situate in khata khewat No. 1. The discrepancy between the description of the property in the deed of gift and in the khewat would have put the defendant-appellant on an enquiry and on making an inspection of the registers in the registration department, he would undoubtedly have discovered that the property as described in the deed of gift in favour of his mortgagor had already been mortgaged to the plaintiffs. The ignorance of the defendant as to the incumbrance on the property in dispute was therefore due to the omission on his part to inspect the title-deed of his mortgagor and he, as such, himself contributed to the injury about which he now complains. Putting the matter in another way, the plaintiffs omitted to examine the entries in the revenue papers which after all are not conclusive evidence of ownership, while the defendant-appellant did not examine the title-deed of his mortgagor which is the primary

evidence of title. The negligence of the defendant-appellant therefore was much more than the alleged neglect on the part of the plaintiffs. For the reasons given above we hold that the Courts below rightly postponed the defendant's security to that of the plaintiffs' mortgage and we dismiss this appeal with costs. There is a cross-objection filed by the plaintiffs-respondents with regard to the order for costs contained in the judgment of the lower appellate Court. Costs are in the discretion of the Courts concerned and in the present case we are not prepared to hold that the lower appellate Court did not exercise a judicial discretion in passing the order that it did as regards costs. The cross-objection is also dismissed with costs