
(1924) 03 CAL CK 0003
In the Calcutta High Court

Sailesh Chandra Guha

APPELLANT

Vs

Bechai Gope and Others

RESPONDENT

Date of Decision : 05-03-1924

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 22
Contract Act, 1872 — Section 19A

Citation : 84 Ind. Cas. 124

Hon'ble Judges : Newbould, J; B.B. Ghose, J

Bench : Division Bench

Judgement

1. This appeal is by the plaintiff and arises out of a suit for enforcement of a mortgage by sale of the mortgaged properties. The mortgage-bond is dated the 4th June 1907 and was executed by defendant No. 1 in favour of one Mathura Mohan Saha for Rs. 130 by which he mortgaged all his properties. The stipulated rate of interest was Rs. 5 per cent, per month with five monthly rests and the due date was in the Asswin following the date of the bond. Mathura Mohan died sometime, in June or July 1916 and his sons, pro forma defendants Nos. 29 to 33 succeeded, to his interest as his heirs. Plaintiff obtained an assignment of the bond from the pro forma defendants for a consideration of Rs. 900 by a deed dated the 26th September 1919 and brought this suit on the 27th October 1919. The mortgage-money due on that date is said to have amounted to Rs. 83,917-12 but considering that so much money cannot be realised from the mortgaged, property plaintiff has claimed only Rs. 9,999 and abandoned the claim for the balance. Defendants Nos. 2 to 28 have been impleaded as having acquired some interest in different portions of the mortgaged property subsequently to the mortgage. Defendants Nos. 3, 4, 5, 6 and 7 and defendant No. 8 only appeared and contested the suit. Defendants Nos. 3, 4 and 5 do not claim any right independently in themselves and are in the same interest as defendants Nos. 6 and 7. Defendants Nos. 6 and 7 purchased properties Nos. 2, 4, 5 and 11 of the schedule to the plaint from the defendant No. 1 by a kobala dated the 7th May 1918 and the defendant No. 8 took mortgages of a ? annas

share of property No. 2 and 2 annas share of properties Nos. 1, 3, 7 and 10 by three deeds, two of which bear the date of 7th August 1918 and one of 8th October 1918:

2. The defence of defendants Nos. 6 and 7 is contained so far as the present appeal is concerned in paras. 7, 8, 9 and 18 of their written statement. Shortly stated their story is that defendant No. 1 having proposed to sell his properties to these defendants, defendant No. 7 went to the pro forma defendant No. 30, in order to ascertain the dues on the mortgage-bond of defendant No. 1 and a final settlement was arrived at with defendant No. 30 who is the karta of the family, that the mortgage would be discharged on payment by defendants Nos. 6 and 7 of the: principal with interest as in previous bonds (i, e., 14 annas per cent, per month) and on the absolute faith of that statement these defendants settled the price with defendant No. 1 and purchased the properties, but when they went to pay the mortgage-debt as settled, defendant No. 30 did not accept the money on some pretext or other. They plead that the mortgagees were guilty of a breach of contract and further they were estopped from claiming a larger amount than what they represented to be due and so the plaintiff cannot recover any sum in excess of that amount. It is unnecessary to state the defence of defendant No. 8 here as it will be dealt with later on. The Subordinate Judge passed a decree in favour of the plaintiff for Rs. 381-0-6 calculating the interest on the principal at the rate of 14 annas per cent, against all the defendants. The plaintiff has appealed. Before, dealing with the question raised by the appellant the contention of the respondents that the frame of the suit is in contravention Order XXXIV, Rule 1, of the C.P.C. may be disposed of. It is based on the allegations contained in para. 3 of the written statements that defendant No. 8 has co-sharers who have not been made parties. This question was raised in the third issue in the Court below and decided against the defendants. No cross-objection was filed by the respondents in this Court under Order XLI, Rule 22 of the Code and it is not, therefore, open to them to take that ground, as it is not one in support of the decree made, but which if sustained, would render the decree invalid. Moreover the bonds being in favour of defendant No. 8 he alone was made a party, and he represented the interest of his co-sharers, if any, sufficiently for the purpose of this suit. The decree cannot, therefore, be reversed on that ground.

3. The questions raised before the lower Court which require our consideration were, whether there was any contract between the contending defendants and pro forma defendants as alleged and whether the stipulation for interest was hard and unconscionable or penal. These were covered by the 5th and 6th issues raised in that Court. The learned Subordinate Judge held that the defendants had succeeded in proving that Nabadwip Saha had agreed with defendant No. 7 to accept the principal with interest at the rate of 14 annas per cent, in full discharge of the mortgage-debt, and that Nabadwip was the Manager of the joint family. He also found that when that defendant offered the money as agreed, Nabadwip declined to accept it on some pretext. Upon this finding he held that

the plaintiff is not entitled to recover any amount in excess of what was agreed upon by his vendors. He also held that Mathura Mohan, the original mortgagee, was, in a position to dominate the will of defendant No. 1, and he used that position to obtain an unfair advantage over the latter and consequently the bargain can be assailed as unconscionable.

4. It is contended by the learned Vakil for the appellant that the facts necessary for substantiating a case of undue influence have not been proved and the mere fact that the rate of interest is high would not justify the interference of the Court. The matters to be dealt with when a case is sought to be brought within the provisions of Sub-section 3 of Section 16 of the Contract Act, have been explained by the Judicial Committee in the recent case of Raghunath Prosad Sahu v. Sarju Prosad Sahu 82 Ind. Cas. 811 : A.I.R (1924). (P.C.) 60 : 5 P.L.T. 72 : 22 A.L.J. 105 : 2 P.L.E. 87 : 19 L.W. 470 : 34 M.L.T. 57 : 26 Bom. L.R. 595 : 46 M.L.J. 610 : 3 Pat. 279 : 28 C.W.N. 834 : 11 C.L.J. 122 : (1924) M.W.N. 038 (P.C.). We do not, however, consider it necessary to go into the question whether the facts establish undue influence or not, as we are of opinion that it is not open to the contesting defendant to raise that plea. Section 19A of the Contract Act provides that a contract is voidable at the option of the party whose consent to it was caused by undue influence. Defendant No. 1 whose consent is alleged to have been caused by undue influence did not at any time avoid the contract nor does he seek to do so now. The contesting defendants as transferees of portions of the mortgaged property are not competent to avoid the deed on the ground of undue influence exercised on defendant No. 1.

5. It is next contended by the appellant that the Subordinate Judge is wrong in deciding the case on the finding that there was a valid binding contract. It is urged that (1) oral evidence of the alleged contract is not admissible under the provisions of Section 92 of the Evidence Act, (2) the evidence does not establish a completed contract, which only shows that there was a mere promise by the mortgagee which was not binding on him and which he could withdraw at any time, (3) there being no consideration the contract was void, (4) Nabadwip was not the karta and could not bind all the pro forma defendants by any contract, and (5) assuming there was a binding contract with defendants Nos. 6 and 7, defendant No. 8 is not entitled to any advantage on the basis of such contract.

6. The evidence that has been given is not of an oral agreement varying the terms of a written contract between the parties to the oral instrument, but of a different contract between the defendant No 7 and Nabadwip as regards the terms on which Nabadwip would assign or release his incumbrance on the property which defendant No. 7 was about to purchase. We are of opinion that Section 92 of the Evidence Act has no application to such an agreement which did not vary the contract between Mathura Mohan and defendant No. 1. We, therefore, hold that the evidence is admissible. We shall next deal with the 2nd and 3rd points raised. The uncontradicted evidence on behalf of the defendants satisfactorily proves the facts as found by the learned Subordinate Judge. The

substance of the evidence is that defendants Nos. 6 and 7 wanted to purchase the properties of defendant No. 1 and they desired to do so free from the incumbrance of the mortgage-bond. Defendant No. 7 desired to settle the amount on payment of which the incumbrance would be discharged by Nabadwip. On receiving the information defendant No. 7 settled the price to be paid to defendant No. 1 who executed the kabala, but when defendant No. 7 tendered the money as settled with Nabadwip, he put him off and subsequently did not accept it Defendant No. 7 say, "I would not have purchased the lands had not Nabadwip promised to accept his dues as stated above." We have no doubt that on these facts a concluded contract between Nabadwip and defendant No. 7 has been established. At that time a complete title to the mortgaged property could only be obtained by defendant No. 7 if he could get the interest of defendant No. 1 as well as that of the mortgagee. The defendant No. 7 went to the mortgagee first for ascertaining the consideration to be paid to the mortgagee in order to obtain a release of the mortgagee's interest, and both of them came to an agreement with regard to the matter. This amounted to a contract which may be said to be contingent on the defendant No. 7 purchasing the equity of redemption. The statement of the mortgagee may also be taken to be an offer made by the mortgagee which was never withdrawn and must be considered to have been accepted by the defendant No. 7 when the equity of redemption was purchased. The purchase of the property and the alteration of the position of the defendants on the faith of the offer by the mortgagee is good consideration for the contract, and is therefore, binding on the parties. The question has been argued from another point of view, that is, whether upon the facts the plaintiff is not estopped from claiming a larger amount from these defendants by reason of the representation made to them. The learned Vakil for the appellant urges that there can be no estoppel in this case and he relies on the speech of Lord Selbourne in *Maddison v. Alderson* (1911)104 L.T. 288 : 27 T.L.R. 281, that the doctrine of estoppel by representation is applicable only to representations as to some existing state of facts alleged to be at the time actually in existence, and not to promises de futuro, which if binding at all, must be binding as contracts. The question is not free from difficulty. It has however been held in England that an undertaking may operate as an estoppel though in the absence of consideration it cannot amount to a contract: *Fairfield Shipbuilding Co. v. Gardner Mountain and Co.* (1911) 104 L.T. 288 : 27 T.L.R. 281, *In re Wickham* (1918) 34 T.L.R. 158 : (1917) H.B.R. 272. The rule is stated thus by Bigelow: "Situations may arise, indeed, in which a contract should be held an estoppel, as in certain cases where only an inadequate right to action would, if estoppel were not allowed, exist in favour of the injured party. In such a case estoppel may sometimes be available to prevent fraud and a circuitry of action" Bigelow on Estoppel, 6th Edition, pp. 639, 640. The learned Vakil for the respondent relies on *The Ganges Manufacturing Co. v. Sourujmull* 5 C. 669 : 5 C.L.R. 533 : 2 I D (N.S.) 1033 , which is the leading case on the subject in our Court. There an order for delivery of goods to a person was signed by the agent of the defendant Come any, on the faith of which the plaintiffs were induced to

pay a certain sum of money to the purchasers of the goods. It was held that the defendants were estopped from setting up a lien and refuse delivery of the goods Sir Richard Garth, C.J., after stating the fallacy of the argument on behalf of the defendants that all rules of estoppel are also rules of evidence observes, But "estoppels," in the sense in which the term is used in English legal phraseology, are matters of infinite variety, and are by no means confined to the subjects which are dealt with in Chap. VIII of the Evidence Act. A man may be estopped, not only from giving particular evidence, but from doing acts, or relying upon any particular arguments or contention which the rules of equity and good conscience prevent his using as against his opponent." In the present case the undertaking of the mortgagee was as if he had said, "I shall accept so much in satisfaction of our debt. I release the balance in your favour. You may purchase the equity of redemption." The defendants relying upon that statement purchased the property which they otherwise would not have done. Can the mortgagee now turn round and say that he is entitled to claim the full amount of the bond? To allow him to do so would be to give him an advantage over the defendants by a sort of trickery, which as a rule of equity and good conscience no Court should do. In any view then whether the matter is looked upon as a contract or as operating as an estoppel the mortgagees would be bound. It is not questioned that plaintiff as an assignee from the mortgagees would be as much bound as his vendors. As to the 4th point urged that Nabadwip was not the karta of the family of the mortgagees, although the fact was distinctly alleged in the written statement and evidence given in its support, it was not challenged in the lower Court nor is there any evidence to the contrary. The result is that the plaintiff is not entitled to realise from the defendants Nos. 3 to 7 anything in excess of what was decreed by the Court below.

7. The case of defendant No. 8 and the other defendants stand on a different footing. The defence of defendant No. 8 is that at the time of taking his mortgages he was assured by defendants Nos. 1 and 28 that they would be primarily responsible for payment of the debt and then the two defendants Nos. Band 7. This is really no defence to the action. Defendant No. 8 cannot take advantage of any contract with defendant No. 7 nor of any estoppel, as no representation was made to him. His mortgages were subsequent to the release of the properties purchased by defendants Nos. 6 and 7. He is, therefore, not entitled to claim any rateable distribution of the mortgage-debt. The only effect of the action of the mortgagees is, that their mortgage security was diminished and they were entitled to throw the whole burden of the debt on the other properties. The plaintiff is, therefore, not debarred from enforcing his claim against those properties. This question is, therefore, decided in favour of the appellant.

8. We have now to consider the decree to be passed in this case. There has been a subdivision of the mortgage-debt by the act of the mortgagees. The plaintiff is entitled to get only Rs. 381-0-6 the amount decreed by the lower Court, out of the properties purchased by defendants Nos. 6 and 7. The appeal against

defendants Nos. 3 to 7 will, therefore, be dismissed with costs. The decree will be prepared by setting off the mortgage-money against the costs awarded to those defendants. The plaintiff having limited his entire claim to Rs. ,9,999 Ixe will recover the balance of Rs, 9,617-15-6 out of the properties other than those described in Nos. 2, 4, 5 and 11 of the schedule to the plaint, that is, those purchased by defendants Nos. 6 and 7, and a decree will be made against defendants other than defendants Nos. 3 to 7 for that amount with proportionate costs in this Court and the Court below. The costs will be added to the mortgage-money. The decree of the Subordinate Judge is varied to this extent. The usual mortgage-decree will be prepared fixing the date of redemption one month from this date. The decretal amount will carry interest at the rate of 6 per cent, per annum from that date until realization.