

(1940) 07 CAL CK 0002

In the Calcutta High Court

Case No : Appeal from Appellate Decree No. 1258 of 1938

Sarashibala Seal

APPELLANT

Vs

Atasi Kanta Ganguly and Others

RESPONDENT

Date of Decision : 11-07-1940

Acts Referred:

Citation : (1940) 07 CAL CK 0002

Final Decision : Dismissed

Judgement

Biswas, J.—There is absolutely no substance in this appeal. The Plaintiff is the wife of the shebait of a certain deity and (sic) rings the suit for the purpose of obtaining a declaration that a mortgage decree obtained by Defendants Nos. 2 and 3 against the shebait, who is Defendant No. 4, is not binding on the debutter estate. She had instituted another suit praying for the same relief, but that was in her capacity as the shebait next in succession to her husband. It was held in that suit on second appeal to this Court that she was not a prospective shebait, and therefore, not competent to maintain the suit which was accordingly dismissed, but the question as to whether the Plaintiff could maintain a suit in any other capacity was expressly left open. It is apparently this reservation in the judgment of this Court that has led to the present suit by the Plaintiff, suing as a person interested in the worship of the deity. Both the Courts below have held that she is competent to sue as such, and it is not necessary for me to hold to the contrary for the purpose of disposing of this appeal, because I am satisfied that the suit must fail on the merits.

2. On the merits, the two Courts have taken opposite views, the lower Appellate Court definitely holding that there was legal necessity for the mortgage, and that the mortgage decree is consequently binding on the debutter estate.

3. This finding has been strenuously challenged before me, and the main ground on which this has been done is that in the earlier suit the lower Appellate Court had arrived at a different conclusion. It was argued that that finding was res judicata, and that if not res judicata it was still binding, so that it was not

competent to the Court to re-open the matter and come to a contrary decision in the present suit.

4. I am wholly unable to accede to this contention. For one thing, this was not the position taken up by the Plaintiff in the Court below: she actually led evidence afresh to prove the absence of legal necessity. Apart from this, the outstanding fact remains that as a result of the appeal to this Court, the judgment containing the finding which is sought to be set up as *res judicata* was no longer an operative or subsisting judgment. It is true that the appeal was disposed of on the sole, but sufficing ground, that the Plaintiff had no *locus standi* to maintain the suit as the next prospective *shebait*, and the Court did not at all deal with the other ground raised by the Defendants attacking the finding of the lower Appellate Court on the merits of the case as to the absence of legal necessity. All the same, the appeal was allowed, the decree of the lower Court was set aside, and the suit dismissed, and in my opinion, the effect of it was to wipe out all that was contained in the judgment under appeal.

5. The cases to which my attention was called by the learned Advocate for the Appellant, -*Niamut Khan v. Phadu Baldia* ILR 6 Cal. 819 (F.B.) (1880), *Krishna Behari Roy v. Bunwari Lall Roy* L.R. 21 A. 283 : s.c. ILR 1 Cal. 144 (1875) and *Midnapur Zamindary Co., Ltd. v. Naresh Narayan Roy* L.R. 48 I.A. 49 :s.c. I.L.R.48 Cal. 460 (1920).-are wholly beside the point. In none of those cases was it said or suggested that although a judgment was set aside on appeal, any finding contained in it would still operate as *res judicata* in subsequent litigation between the parties on the same issues. It is one thing to say that though a suit may be dismissed, and the Defendant may, therefore, be precluded from appealing, a finding in the judgment adverse to the Defendant may be still binding on him as *res judicata* or otherwise; it is quite a different thing to say that where an adverse finding is expressly challenged in appeal by the Defendant, but the Appellate Court allows the appeal on another ground and dismisses the suit in consequence, that finding will still stand, notwithstanding that such dismissal of the suit involves a reversal of the judgment in which it is contained. The cases cited might have been apposite, if it could be shown that in disposing of the appeal on the last occasion, this Court, while dismissing the suit on the ground that the Plaintiff had no *locus standi*, still intended to maintain the finding of the lower Appellate Court against the Defendants as to the non-existence of legal necessity. In that case the finding might operate as *res judicata*, notwithstanding the dismissal of the suit, as being embodied in a judgment which was subsisting and in force.

6. In my opinion, therefore, the lower Appellate Court on the present occasion was fully entitled to come to an independent finding on the question of legal necessity on the evidence before it.

7. As a result of an examination of such evidence, the Court came to the conclusion that there was legal necessity for the mortgage. Such necessity was said to be constituted by the need of thorough repairs to a house which was

admittedly a part of the debutter property and in which the deity itself was installed. The repairs, according to the Defendants, were carried out in 1921, and the learned Subordinate Judge has found that this was a fact, and that the mortgage loan was raised for the purpose of meeting the cost of such repairs.

8. A point was raised on behalf of the Appellant that the learned Judge had made a confusion as to the year in which the repairs had been carried out. It was said that thorough repairs had been done in 1916, and that if any further repairs were effected, they must have been of an insignificant character for which such a large sum as Rs. 3,500 could not possibly be required. This is, after all, a question of fact and I see no reason to reject the finding of the lower Appellate Court on the point. The learned Advocate made a further complaint that the learned Judge had misread the deposition of a mason who had given evidence in the earlier suit and whose deposition was put in under sec. 32 of the Indian Evidence Act, the witness having died in the meantime. I do not think, however, that the learned Judge made any mistake about it. In the result, I accept the conclusion of the lower Appellate Court that there was actual legal necessity for the mortgage in question. In this view, it is not necessary to consider the other point raised by the learned Advocate as to whether or not the Defendants had in their written statement made out a case of bond fide enquiry on the part of the mortgagees regarding the existence of the alleged legal necessity.

9. The last point urged in this appeal is that in order to protect the debutter estate, this Court should direct the appointment of a Receiver in execution of the mortgage decree. That is not, however, a matter before me, and I cannot deal with it. It appears that the sale has already taken place in execution of the decree. There was a stay order issued by this Court pending the appeal, but that was only for stay of confirmation of the sale, and not of the sale which, as stated, had been already held. The result is that the appeal fails on all the points and is accordingly dismissed with costs.