
(1922) 02 CAL CK 0079
In the Calcutta High Court

Saroda Prosad Banerjee and Others

APPELLANT

Vs

Gosto Behari Hazra and Others

RESPONDENT

Date of Decision : 28-02-1922

Acts Referred:

Citation : AIR 1922 Cal 542 : 70 Ind. Cas. 385

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

Bench : Division Bench

Judgement

1. In This appeal the defendants Nos. 1, 2, 3 and 4 are the appellants and the appeal is directed against a decision of. The Subordinate Judge of Midnapore modifying a decision of the Munsif. The suit was commenced by one Sridhar for possession of 20 pots in Schedule Ka and for confirmation of possession of 11 plots in Schedule Ga. One Shyama Charan was the owner of one-fifth share of the plots comprised in Schedule Ka. He was also entitled to a similar share of the plots comprised in. Schedule Ga. Shyama Charan died leaving three sons, Sridhar, Srinath and Saroda. Srinath died leaving a daughter Kusum Kumari and Saroda died leaving a widow Sasimukhi. The joint family formed by these persons was in straitened, circumstances and Sridhar and Sasimukhi joined in borrowing on mortgage a sum of money, as both Courts have found, for family necessities from one Kali Prasad andthey executed in favour of Kali Prasad usufructuary more age in the year 1898 of plots No.1 to 6 in Schedule Ka, representing that they, that is to say, Sridhar and Sasimukhi, wife entitled to deal with the whole interest. A decree was obtained against Sridhar and Sasimukhi and on the 14th April 1900, Sridhar andSasimukhi borrowed : money to pay off this decree by mortgaging plots Nos. 7 to 10, plot No. 12, plot No. 13 and plots Nos. 17 to 20 of Schedule Ka, and in the year 1901 Kali Prasad obtained a decree against Sridhar and Sasimukhi in respect of the mortgage. The plots were sold on the 16th July 1920, that is to say, the plots comprised in the mortgage, and they were purchased by the mortgagee, Kali Prasad, with the exception of plots Nos. 18 to 20, which were bought by the first defendant in the present suit. The sale did not realise sufficient to pay off the mortgage-debt and on the 7th

February 1905 Kali Prosad assigned his interest in plots Nos. 7 to 10 and plots Nos. 12, 13 and 17 to defendant No. 4 who was a be named of defendant No. 3. Sridhar in 1905 obtained a lease of all the plots Nos. 18 to 20 from defendant No. 1. As I have already stated, the mortgage-sale did not realise sufficient to pay off the mortgage-debt and accordingly defendant No. 3, the assignee of Kali Prosad; took steps u/s 90 to balance of the decretal amount due" under the mortgage, and on the 3rd November 1905, the equity of redemption in plots Nos. 1 to 6 and in plot No. 15 of Schedule Ka and plots Nos. 4, 8 and 9 to 11 of Schedule ka was sold to pay off the balance of the mortgage-debt. On the 15th November 1905 plots Nos. 2 and 3 of Schedule Ka were Sold for arrears of rent and on the 16th. March 1906, plots Nos. 5 and 6 of the same Schedule were similarly sold for arrears of rent. Sridhar, in the events which had happened, namely, the deaths of Kusum Kumari, and of Sasimukhi, inherited the shares of Srinath and Saroda and it is in respect of these shares that this present suit is brought. Now, the Munsif has found that, with respect to the plaintiff's title to one-half of dags Nos. 2 and 3 and dags Nos. 5 and 6, the plaintiff's title has become extinguished by sales in execution of the rent-decrees and with regard to dags Nos. 1 to 6, he found that the plaintiff cannot invoke the title of Kusum Kumari and he arrived at a similar finding with respect to dags Nos. 7 to 10, 12 and 13 and 17 to 20. He arrives at a similar finding with regard to dags Nos. 14, 15 and 16 and the only relief that he gave to the plaintiff is in respect of plots Nos. 4, 8, 9 and 11 of the Schedule Ga. What in effect he holds is, that the mortgage or, rather, the mortgages, were executed in respect of liabilities which were binding on the whole family and that it is not open to the plaintiff who purported with Sasimukhi to deal with the whole interest to now come forward and set up a claim founded on the fact that by reason of Kusum Kuamri's death he can claim the share of Srinath.

2. On appeal the Subordinate Judge has given to the plaintiff one-third in plots Nos. 7 to 10 and similar portions in plots Nos. 12, 13 and 17 to 20 of Schedule Ka. He also gives two-thirds in plots Nos. 1, 2, 3 and 4 on certain conditions and he gives him two-thirds of plot No. 15 and also a share in plots Nos. 4, 8, 9 and 11 of Ga. He dismissed the suit as far as plot No. 16 of Ka and as far as plots Nos. 5 and 6 of Ka are concerned. Now, so far as plots Nos. 7 to 10 and plots Nos. 12, 13, 17, 18, 19 and 20 are concerned, it is argued on behalf of the appellant that they were comprised in the mortgage of 1901 whereby the plaintiff Sridhar and Sasimukhi purported to transfer the entire interest including the interest of Srinath, and it is urged on behalf of the appellant that having regard to the representation made in that mortgage by Sridhar it is not now open to him to assert that the share of Srinath was not bound by the mortgage. It is not necessary, to refer to the cases which had been cited before us; and clearly as the learned Vakil for the appellant has pointed out, the case upon which the Subordinate Judge (iparently relied, namely the case of Ranga Ran v. Bhavayammi 17 M. 478 : 4 M.L.J. 192 : 6 Ind. Dec. (N.S.) 328 has no application and the Subordinate judge seems to have misconceived, if I may say so, the

principles upon which it was based. In that case the claimant was not the person who had made the representation but it was another person who claimed in another right entirely, that is, in the right of his maternal grandfather and accordingly he was not bound by any representation which may have been made by another person through whom he did not claim and also in respect of another's interest namely that of the paternal grandfather. So far as the other plots are concerned, plots Nos. 14 and 15 and plots Nos. 1, 2, 3; and 4 which were sold in the Section 90 proceedings and plots Nos. 4, 8, 9 and 11 of Ga, it is urged except as regards plot No. 15 and plots Nos. 9 and 11 of Ka that the decision of the lower Court is wrong with regard to the two-thirds of these plots which were given to the plaintiff, having regard to the act that on the findings of both Courts Sasimukh's share must have passed, as the debt was not a personal debt of hers but was one for the necessity of the family as a whole, and the appellant contests the decision of the Subordinate Judge with regard to the one-third share of Kusum Kumari because he says that it was by reason of the representation contained in the mortgage that these shares were brought to sale. On behalf of the respondent it is said that no question of estoppel arises having regard to the finding of the lower Appellate Court which is binding upon us. Now, those findings can be found at pages 26 and 27 of the paper-book, and what the Judge says is this, that the defendants who are the mortgagees or their representatives ought to have proved that Kali Prosad, the mortgagee, did not know of the existence of Kusum Kumari and that as proof of this fact was not given it is not open to the defendants to rely on the doctrine of estoppels. Now, it seems to us that the learned Judge has wrongly laid the burden of proof, so as to this question is concerned; as soon as the mortgage-deed was produced which contained a representation with regard to Kusum Kumari's share, it seems to us that the burden was no longer on the mortgagees to establish that Kali Prosad did not know the true position but the burden of proof shifted on the mortgagors and those claiming under them to show Kali Prosad's knowledge of the true facts. This being so, it does not seem to us that there is any finding of the lower Court which precludes us from holding that the plaintiff Sridhar is bound by the estoppels created by the statement. Then, so far as defendant No. 1 is concerned, what the Judge says is this : that he would hold that defendant No. 1 knew of the existence of Kusum Kumari. But it seems to us that their knowledge is really of no consequence. If Kali Prosad did not know then, the mere fact that defendant No. 1 who claims through Kali Prosad may have known this fact, does not prevent his getting a good title to the properties and relying on the estoppel which Kali Prosad could have set up against any claim by Sridhar in any suit. It seems to us, therefore, that the Munsif is right in the view which he took and that he correctly stated the law so far as estoppels is concerned for the purpose of this case. Accordingly, what in effect we are doing is to restore the decision of the Munsif except that we think that the plaintiff is entitled to one-third share of plot No. 15 of Schedule Ka, that is to say, the share of Kusum Kumari which was not mortgaged and in respect of which no estoppels arises. We accordingly with these alterations restore the decree of the Munsif and reverse

the decision of the Subordinate Judge except as regards the one-third of plot No 15 of Schedule Ka.

3. The appellant will be entitled to get three-fourths of the costs in all the Courts.