

(1915) 12 CAL CK 0002
In the Calcutta High Court

Shib Chandra Kar

APPELLANT

Vs

A.C. Dulcken and Others

RESPONDENT

Date of Decision : 21-12-1915

Acts Referred:

Evidence Act, 1872 — Section 115
Transfer of Property Act, 1882 — Section 43

Citation : 48 Ind. Cas. 78

Hon'ble Judges : Lancelot Sanderson, C.J.; John Woodroffe, J.; Asutosh Mookerjee, J

Bench : Full Bench

Judgement

Lancelot Sanderson, C.J.—This case has taken rather a curious course, and it is about to be decided by the Court upon a point which, as far as I understand, was not taken in the Court of first instance, and was not mentioned in the grounds of appeal, but was one which occurred to the members of the Court, and which was put yesterday to Mr. Das and, I may say for myself, the case was argued exceedingly well on both sides, and when Mr. Das was faced with this point he met it with the candour, which always characterizes his conduct in Court, and in spite of his ingenuity he had to admit practically that there was no answer to it. When I come to deal with the question about costs, I shall have to say something of the course the case has taken. Before I deal with that, I propose to state shortly the facts of the case and then give my judgment.

2. The appeal is by Shib Chandra Kar, who appeals, as I have already said in dealing with the other part of the case, against the decision in favour of another defendant whose name is Dulcken. The learned Judge has decided that Shib Chandra Neogi and Chunilal Neogi formed a joint Hindu family and had a joint business carried on at premises No. 36 Foriapooker Street, that that property was purchased in the name of the wife of Shib Chandra Neogi, and that the plaintiffs who claim through Chunilal were entitled to half that property. The dispute between the defendant Shib Chandra Kar and Dulcken has been confined entirely to the other half, namely, what I may call the half to which the heirs of

Shib Chandra Neogi were entitled.

3. Now, Shib Chandra Neogi had a daughter whose name was Giribala who had six sons, Satish Chunder Sur, Suresh Chunder Sur, Sirish Chander Sur, Sarat Chunder Sur, Subodh Chander Sur and Susil Chunder Sur. There were considerable dealings with the property in question into which I do not intend to go--the material dealings were three mortgages: the first was dated the 13th of February 1901 in which Giribala was the mortgagor and her eldest three sons, Satish, Suresh and Sirish joined; the mortgage was to a man called Tincowrie Haldar, and the property was mortgaged for Rs. 4,000. On the 22nd of January 1902 there was another mortgage of the same property by Giribala and the same three sons, to Shib Chandra Kar, the defendant, for Rs. 4,500. On the 12th of January 1903, there was a further mortgage to one Nilkanta Pal and in this mortgage Giribala joined on behalf of herself and also on behalf of her two infant sons Subodh and Susil, and to this mortgage her first, third and fourth sons, Satish, Suresh and Sarat were parties, the second son Sirish having died in the meantime; that was a mortgage for Rs. 3,000. On the 25th of February 1904, Tincowry Haldar obtained a decree in Suit No. 278 of 1903; the defendants to that suit were Giribala, Satish and Suresh and the subsequent encumbrancers Shib Chandra Kar and Nilkanta Pal. On the 27th of April 1904, there was an agreement between Giribala and all her sons, except Sirish who was dead at that time, by which the parties agreed to sell the property in Foriapooker Street and another property to Dulcken subject to mortgages--the mortgages being specifically mentioned--and subject to the decree in Suit No. 273 of 1903. On the 17th of December 1905, Giribala died. On the 2nd of March 1906, Nilkanta Pal assigned his mortgage-debt and his benefit under the decree to the defendant Shib Chandra Kar. On the 23th of March 1906, there was a substitution order on the register of the suit by which Sarat and one or two of his brothers were added as parties. On the 24th of July 1903, there was a conveyance to Hutchison by Satish, Sarat and Suresh, the three sons, and Harish, their father, and it is the basis of the title of Dulcken. By that, these three sons purported to convey their 3/5th share of the property: in that conveyance there was no mention or recital of the mortgage. On the 31st of July 1908, there was an order amending the decree and substituting the names of the sons for that of the mother Giribala; and, on the 3rd of May 1909 the decree was made absolute for sale. On the 16th of April 1910, Hutchison conveyed the property, or rather I think I shall be more accurate in saying the 3/5th share of half the property, to Dulcken for Rs. 500. On the 2nd of August 1910, Tincowrie Haldar assigned his decree to the defendant Shib Chandra Kar and all rights under it for Rs. 3,100. On the 23rd of August 1910 Shib Chandra Kar was made plaintiff in Suit No. 278 of 1903. In December there was a sale by the Registrar, and at this sale Shib Chandra Kar purchased all the properties, and paid a sum of Rs. 17,600. On the 7th March 1911, the sale certificate was handed to Shib Chandra, Kar. There is one other fact which I need now mention, and that is that on the 24th of March 1911 the infant sons, the fifth and sixth sons of Giribala in consideration of a sum of

money, Rs. 500, released all interests in the property to the defendant Shib Chandra Kar.

4. Now, the question arises upon those facts whether the defendant Dulcken is entitled to 3/5th share of this property in Foriapooker Street or to any part of that 3/5th share. The learned Judge has held that he was. In my judgment the appellant is entitled to succeed upon this ground--and I may mention here, as I have already mentioned, that I do not differ from the learned Judge's judgment because this point was never raised before the learned Judge, and he never had an opportunity of considering it--I think that by joining in the mortgage of 1903, Sarat and the other two sons, who were the parties conveying to Hutchison in 1906, represented that the property was being mortgaged by their mother for what has been called legal necessity. Upon those mortgages decrees have been made. But I am prepared to hold and do hold that apart from those decrees those sons who joined in those mortgages would not be allowed to go back upon those representations when they are dealing with a party such as Shib Chandra Kar, who has changed his position relying upon the representations of fact, Shib Chandra Kar having parted with no less than Rs. 17,600. In the course of the argument, I referred to the well-known case of *Pickard v. Sears* (1837) 6 A. E. 469 : 2 N. & P. 488 : 112 E.R. 179 : 45 R.R. 538 and also the case of *Carr v. London and North Western Railway Co.* (1876) 10 C.P. 307 : 44 L.J.C.P. 109 : 31 L.T. 785 : 23 W.R. 747 and I read to Mr. Das a passage which I read again, (see *Leake on Contract*, sixth Edition, page 4) "where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things,"--I pause here for a moment and point out that in the present case the three sons by their conduct and statement wilfully caused another to believe in the existence of a state of things to this effect that Giribala was mortgaging the property for a legal necessity and was entitled to convey the whole of the property--"and induces him to act on that belief or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." Therefore in my judgment, the three sons would be estopped from denying, as far as Shib Chandra Kar was concerned, that the state of things which they had represented existed. Then Mr. Das drew my attention to Section 115 of the Indian Evidence Act and also to the illustration which" is given in the section, although it was directly contrary to his client's case but naturally it was his duty and he did perfectly right in drawing our attention to it, where the illustration given is, "A intentionally and falsely leads B to believe that certain land belongs to" A, and thereby induces B to buy and pay for it. The land afterwards becomes the property of A, and A seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title."

5. For these reasons I am of opinion that Dulcken, who claims in this case through the three sons whose names I have mentioned, obtained no better interest in this particular property than the sons themselves had and, therefore, this appeal must be allowed.

6. Now, as regards the costs--I speak entirely for myself for the present moment but I think my learned brothers will agree with me--this case had a most unfortunate course. In the Court below the question of legal necessity was only raised, if I may call it, at the last minute, and an adjournment was taken in order that the appellant might prove, if he could, the case of legal necessity on the part of Giribala and her three sons who joined with her: Then the learned Judge on the facts and on the evidence which was given at the late stage of the case decided against the case of legal necessity. That being so, the appellant comes to this Court and he first of all argued that the learned Judge was wrong in holding that no case of legal necessity was proved, and then went on further to argue that even if he could not substantiate that case, he was entitled to succeed on the ground that under the circumstances of this case there was a presumption, by reason of the mortgages by the three sons who were of age at the time the mortgages were given, that there was a legal necessity, and that inasmuch as the other side did not rebut that presumption, the appellant is entitled to succeed. Even that case, as far as I can understand, was not urged in the Court below, and the ground upon which we have decided the case was not mentioned in the notice of appeal, and that is the only ground upon which this appeal has been allowed. I purposely abstain from expressing any opinion as to whether the learned Judge was right in holding that there was no such legal necessity : speaking for myself," I should have very great hesitation in interfering with his judgment on that point. I also refrain from expressing any opinion as to whether there was the presumption. If I were to do that, I should have to consider very closely indeed, whether the other side ought not to have an opportunity of displacing that presumption. Fortunately we have not to do that: for I think the appellant is entitled to succeed upon the ground I have mentioned. Having regard to these circumstances, I think the appellant ought not to have any costs against Dulcken either in this Court or in the Court of first instance and that each party should bear his own costs in this Court and in the Court of first instance.

Woodroffe, J.

7. I agree both as to the order passed on the appeal and as to costs.

Mookerjee, J.

8. This is an appeal by the first defendant in a suit for partition of joint property, which belonged originally to two brothers Shib Chandra Neogi and Chunilal Neogi, though it had been acquired and continued to stand in the man of Ranimoni Dasi, the wife of the elder brother. The question of the devolution of the share of the younger brother is not in controversy in this appeal, and, we are concerned only with the share of the elder brother. The rival claimants in respect of this share are the appellant Shib Chandra Kar and the respondent Arthur Clayton Dulcken; the former sets up a title by purchase at a sale held in execution of a decree on three mortgages granted on the 13th February 1901, 22nd January 1902, and 12th January 1903 by Giribala, the daughter of Shib Chandra Neogi and Ranimoni Dasi; the latter claims as assignee from three of

the sons of Giribala who had joined with their mother in the execution of one or more of the mortgages already mentioned. Mr. Justice Chaudhuri has decided in favour of Dulcken on the ground that the mortgages granted by Giribala and the sale consequent thereon did not bind the inheritance in the hands of her sons. On the present appeal, the argument was at first directed to controvert this proposition, and reliance was placed upon the decision of the Full Bench in *Debt Prosad Chowdhry v. Golap Bhagat* 19 Ind. Cas. 273 : 17 C.W.N. 701 : 17 C.L.J. 499 : 40 C. 721 (F.B.) as to the precise effect of a transfer by a limited owner with the concurrence of some of the reversionary heirs. If the decision of the appeal had depended on the determination of this question, it would have been necessary for the Court to consider, whether, upon the pleadings, the appellant should have been allowed to raise this point in the Court of first instance, and, whether upon failure of the case made in the trial Court, he should be allowed to rely here upon a radically different aspect of the matter. As the argument proceeded, however, it transpired that the determination of the rights of the parties really depended upon a question of law, neither raised nor investigated in the Court of first instance, namely, were the vendors of the respondent Dulcken estopped to deny the validity of the mortgages (to which they were parties) and the operative character of the consequential execution sale. This question must be entertained and decided by this Court, as its solution does not require the investigation of new facts. In this connection, we may usefully recall to mind the observations of Lord Watson in *Connecticut Fire Insurance Co. v. Kavanagh* (1892) A. C. 473 : 61 L.J.P.C. 50 : 67 L.T. 508 : 57 J.P. 21 "when a question of law is raised for the first time in a Court of last resort, upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea."

9. We must now examine the true legal position of the three sons of Giribala who joined with her in the mortgage transactions; and, upon her death, transferred the property on the 24th July 1906 to Hutchison, from whom Dulcken purchased on the 16th April 1910. The record shows that the first two sons not only joined their mother in the execution of the first two mortgages but were also parties to the mortgage suit, which, on the 25th February 1904, resulted in the usual decree for sale, subsequently made absolute on the 3rd May 1909. The other son, though one of the executants of the mortgage of the 12th January 1903, was not made a party to the mortgage suit in the first instance; but on the death of his mother on the 17th December 1905, he was brought on the record as one of her representatives-in-interest. I use this inaccurate expression, as it occurs in the decree; but what happened in essence was that the sons of Giribala were, upon her death, brought on the record of the mortgage suit to represent that interest in the hypothecated property which was sought to be bound by the decree made therein: *Premmoyi Choudhrani v. Preonath Dhur* 23 C. 636 at p. 737 : 12 Ind. Dec. (N.S.) 423. There is no controversy that on the dates when the mortgages were executed, the entire interest in the property was vested in Giribala and Giribala alone, subject, no doubt, to the qualification that as she was

a limited owner, she could bind the inheritance by a transfer, only if it was made under circumstances recognized as necessary or proper under the Hindu Law. Now each of these mortgages recited her title as derived from her mother by right of inheritance and narrated the circumstances which constrained her to create the incumbrances. Here, we may observe parenthetically that whether the property belonged really to her father or to her mother, she would equally take as the heiress; in either contingency, she would be a limited owner, and, upon her death, the property would pass to her sons, who were the reversionary heirs, as much of the estate of her father as of the stridhan property of her mother. It was thus wholly immaterial, for purposes of devolution, whether the property belonged really to her father or to her mother. The mortgages no doubt proceeded on the assumption that the property belonged to her mother and that the money raised was required for such legitimate purposes as justified an absolute alienation of the inheritance by a limited owner, but how could this prejudice the position of the mortgagees how could the mortgagors be allowed to rely upon some title other than that alleged in their deed? *Brijraj Nopani v. Pura Sundary Dassee* 24 Ind. Cas. 296 : 41 I.A. 189 : 20 C.L.J. 368 : 42 C. 56 : 27 M.L.J. 93 : 18 C.W.N. 1313 : 1 L.W. 555 : (1914) M.W.N. 679 : 16 Bom. L.R. 796 : 16 M.L.T. 338 : 12 A.L.J. 1185. The question thus inevitably arises, whether her sons who joined with her in these mortgages are concluded by their solemn declarations, or whether they are free to resile from the position they deliberately took up and to rely upon a title derived, not from their maternal grandmother, but from their maternal grandfather, and thus impeach, possibly defeat, the interest of the mortgagee; this, be it noted, is not a question as to their competency to bind their expectant interest as reversioners by actual alienation before the succession had opened out: *Sham Sundar Lal v. Achhan Kunwar* 21 A. 71 : 2 C.W.N. 729 : 25 I.A. 183 : 7 Sar. P.C.J. 417 : 9 Ind. Dec. (N.S.) 755 . In my opinion, Section 115 of the Indian Evidence Act furnishes an answer emphatically in the negative. This conclusion is supported by the decisions of the Judicial Committee in *Sarat Chunder Dev v. Gopal Chunder Laha* 20 C. 296 : 19 I.A. 203 : 6 Sar. P.C.J. 224 : 10 Ind Dec. (N.S.) 201 and *Chandra Kunwar v. Chaudhri Narpatt Singh* 34 I.A. 27 : 4 A.L.J. 102 : 11 C.W.N. 321 : 5 C.L.J. 115 : 17 M.L.J. 103 : 2 M.L.T. 109 : 9 Bom. L.R. 267 : 29 A. 184 . In the former case, Lord Shand said: What the law and the Indian Statute mainly regard is the position of the person who was induced to act; and the principle on which the law and the Statute rest is, that it would be most inequitable and unjust to him that if another, by a representation made, or by conduct amounting to a representation, has induced him to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it." In the latter case, Lord Atkinson said: "In *Heane v. Rogers* (1829) 9 B. C. 577 : 109 E.R. 215. Bayley, J., in delivering the judgment of the Court lays it down that: there is no doubt but that the express admissions of a party to the suit, or admissions implied from his conduct, are evidence, and strong evidence, against him; but we think he is at liberty to prove that such

admissions were mistaken or were untrue, and is not estopped or concluded by them unless another person has been induced by them to alter his condition. In such a case, the party is estopped from disputing their truth as against that person (and those claiming under him) and that transaction, but as to third parties he is not bound. In *Newton v. Liddiard* (1848) 12 Q.B. 925 : 6 Railw. Cas. 42 : 18 L.J.Q.B. 53 : 116 E.R. 1117 Lord Denman approved and adopted this statement of the law; and *Morgan, Ex parte, In Re: Simpson* (1876) 2 Ch. D. 72 : 45 L.J. Bk. 36 : 34 L.T. 329 : 24 W.R. 414 and *Trinidad Asphalte. Co. v. Goryat* (1896) A.C. 587 : 65 L.J.P.C. 100 : 75 L.T. 108 : 45 W.R. 225 in effect illustrate the same principle." Reference may also be made to other decisions which illustrate this principle : *Cairncross v. Lorimer* (1860) 3 Macq. H.L. 829 : 7 Jur. (N.S.) 149 : 3 L.T. 130 *Pickard v. Sears* (1837) 6 A. & E. 469 : 2 N. & P. 488 : 112 E.R. 179 : 45 R.R. 538 and *Freeman v. Cooke* (1848) 2 Ex. 654 : 6 Dowl. & L. 187 : 18 L.J. Ex. 114 : 12 Jur. 777 : 76 R.R. 711 : 154 E.R. 653 *Cornish v. Abington* (1859) 4 H. & N. 549 : 28 L.J. Ex. 262 : 7 W.R. 504 : 118 R.R. 603 : 157 E.R. 956 *Carr v. London and North Western Railway Co.* (1876) 10 C.P. 307 : 44 L.J.C.P. 109 : 31 L.T. 785 : 23 W.R. 747 *Stton v. Lafone* (1887) 19 Q.B.D. 68 : 56 L.J.Q.B. 415 : 57 L.T. 547 : 35 W.R. 749 and *Bepin Behari Mitter v. Tinkowri Pathak* 9 Ind. Cas. 374 : 13 C.L.J. 271 : 15 C.W.N. 976 the doctrine was recognised as early as 1812, when the Sudder Court held in *Mohun Lal Khan v. Ranees Siroomunnee* 2 Mac. Sel. Rep. 40 : 6 Ind. Dec. (O.S.) 389 that a reversioner who has voluntarily signed the deed of the widow cannot legally claim in opposition thereto, *Sia Dasi v. Gur Sahai* 3 A. 362 : 2 Ind. Dec. (N.S.) 170. and *Ramadhin v. Mathura Singh* 10 A. 407 : A.W.N. (1888) 79 : 13 Ind. Jur. 232 : 6 Ind. Dec. (N.S.) 274; Mr. Das, who argued the case for the respondent with great ability indeed, admitted with his usual candour, that the sons who had actually joined in the mortgages granted by their mother could not be heard to maintain to the detriment of the mortgagee or of the purchaser at the mortgage sale : *Sarat Chunder Dey v. Gopal Chunder Laha* 20 C. 296 : 19 I.A. 203 : 6 Sar. P.C.J. 224 : 10 Ind Dec. (N.S.) 201 that the recitals therein were untrue, but he contended that the position of the transferee from them was different in view of Section 43 of the Transfer of Property Act, which defines the effect of a transfer by an unauthorised person who subsequently acquires an interest in the property transferred". In my opinion, that section is of no real assistance to the respondent, even on the assumption that he is a purchaser for value" without notice. The sons are concluded by the recitals in the mortgage instruments to which they were parties; those recitals establish indisputably that the appellant has obtained an absolute title to the property, a title not defeasible at the instance of the sons; consequently, no title did or could pass to the purchaser from the sons. The two sons who were parties to the mortgage suit and are bound by the decree made therein, are obviously in a position of still greater embarrassment than their brother who was not initially made a party to that suit. There is, further, no room for doubt that what was mortgaged was the entire interest in the property, which was precisely what was intended to be bound by the decree and to be sold thereunder. This follows irresistibly from the

fact that the execution sale actually took place after the death of Giribala, for if the decree had been intended to bind merely the limited interest of Giribala, a sale would have been impossible after her death. There is thus no escape from the conclusion that the Court intended to sell the entire interest, and, in the events which have happened, that interest has vested in the appellant. The appeal must consequently be allowed, and the decision of Chaudhuri, J., reversed in so far as it affects the appellant.