
(1935) 05 CAL CK 0005
In the Calcutta High Court
Case No : Suit No. 283 of 1934

Sm. Champabati Dassee

APPELLANT

Vs

Mahomed Yakub Khan and Others

RESPONDENT

Date of Decision : 24-05-1935

Acts Referred:

Citation : (1935) 05 CAL CK 0005

Judgement

Panckridge, J.—The Plaintiff in this suit is the assignee of a mortgage created on the 4th September, 1925. The mortgaged premises are situated in Calcutta and are known as 25, Arpuli Lane. The mortgagor was Sm. Alia Khatun, described in the mortgage deed as the wife of Yakub Khan, and the mortgagee was Gobind Chunder Dhur. The mortgage is for the sum of Rs. 4,250 with interest at the rate of 12 per cent. per annum, with quarterly rests. The deed is in the usual form and it contains the following covenant amongst others :-- The mortgagor both hereby covenant with the mortgagee that she, the mortgagor, is lawfully seized and possessed of and otherwise sufficiently entitled to the land, hereditaments, premises hereby granted or otherwise assured or intended so to be, free from all encumbrances whatever, and that the mortgagor has full right and full disposal and power to grant transfer and assign such lands, hereditaments and premises in the mortgage in the manner aforesaid.

The mortgagee, Gobind Chunder Dhur, transferred his interest under the mortgage to the present Plaintiff by a registered deed, dated April 11th, 1927. In 1926 the mortgagor, Alia Khatun, died intestate.

2. This suit was instituted on February 15th, 1934, against the heirs and legal representatives of the mortgagor. The 1st Defendant, Mahomed Yakub Khan, is the husband of the deceased mortgagor ; the Defendants Nos. 2, 3 and 4 are her daughters, and the Defendant No. 5 is her brother.

3. Only the 1st Defendant has appeared, and in his written statement he admits execution of the mortgage deed but claims that the property was incapable of alienation, by reason of the provisions of a deed of wakf covering, the property

and executed by his grand-father, Minoo Khan, on February 14th, 1894. He sets out the provisions of the deed and states that by reason thereof the mortgage is incompetent and invalid, and passed no right, title, or interest to the mortgagee which could be transferred to the Plaintiff. Learned Counsel for the Plaintiff submits that the Defendant cannot be permitted to raise the question of the validity of the mortgage, on the ground of the property being wakf property, in this suit. I should have explained that Mahomed Yakub Khan was his wife's first cousin, both being the grand-children of Minoo Khan, who created the alleged wakf.

4. A considerable number of authorities have been brought to my notice, and I have come to the conclusion both on principle and on the balance of authority, that the Plaintiff is right in his contention.

5. The question whether a mortgagor is estopped from denying his right to mortgage the property in a suit for sale or for foreclosure, is discussed at great length in *Debendra Nath Sen v. Mirza Abdul Hamid Sherazi* 10 C. L. J. 150 (1909) and I only quote one passage in the judgment of Mookerjee, J., at page 163 :

A mortgagor must from the nature of the mortgage contract preserve the property pledged for the purpose of the original security and is therefore estopped, independently of any covenants of warranty, from denying the mortgagee's title, or the existence of the lien which he has created, or from defeating its enforcement against the property against which it is placed.

6. It has been suggested that an exception to this rule exists in the case of a religious endowment, and for this proposition the Defendant relies on a passage in the judgment of Page, J., in *Nagendra Nath Palit v. Rajendra Nath Dey* I. L. R. 53 Cal. 132 at p. 148 : s. c. 30 C. W. N. 389 (1925), where Page, J., observed :--

Alienations by a shebait in contravention of the law as laid down in these decisions are void and need not be set aside, and such alienation may be declared void even at the instance of the alienor.

7. That case is easily distinguishable, because there the shebait had not purported to act in his personal capacity but was admittedly acting as the manager of dedicated property. Therefore it seems to me no principle is enunciated in that case, which can usefully be applied to a case where the alienor of property alleged to be wakf has purported to act in an individual capacity, and has expressly covenanted that she has a right to alienate the property. I do not express any opinion on the question of how far that decision can be reconciled with the decision in *Mahamaya Debi v. Haridas Haldar* I. L. R. 42 Cal. 455 : s. c. 19 C. W. N. 208 (1914), nor on the question which decision is to be preferred, if it is not possible to reconcile them.

8. I have no doubt that the defence that the property is wakf property is not a defence which the original mortgagor could have raised in the present suit, were she now alive. I can see no reason why her personal representatives should be

permitted any greater latitude. Assuming that the first Defendant has become by devolution the mutwalli under the deed of wakf of 1894, he is not sued in that capacity, nor in any personal capacity, but purely as representing his deceased wife. In my opinion, the difference between A in his representative capacity and A in his personal capacity is no greater and no less than the difference between A and B. Various authorities have been cited where a Defendant in a suit to enforce a mortgage has been permitted to agitate the question of the right of the mortgagor to create the mortgage. In none of those cases, however, has the Defendant in question been on the record as representing a deceased mortgagor. For example, in *Bhuban Mohan Ghose v. Co-operative Hindusthan Bank, Ltd.* 29 C. W. N. 784 (1925), which was decided by Sanderson, C.J. and Rankin, J., the Defendant in question was the person in whose name the mortgaged property stood, benami according to the Plaintiff. It was held that the issue whether the property belonged to the mortgagor and merely stood in the name of the alleged benamdar, or was the alleged benamdar's own property was properly tried in the mortgage suit. Other cases References are to--*Hare Krishna v. Robert Watson & Co.*, 8 C. W. N. 365 (1901), *Srimanta Sil v. Bindubasini Dasi*, 38 C. L. J. 183 (1922) and *Kedarnath Ojha v. Kshrioada Dasee* I. L. R. 60 Cal. 832 (1983), which were cited during argument concern Defendants who have been impleaded on the ground that subsequent to the creation of the mortgage they have purchased a portion of the equity of redemption, and are, therefore, necessary parties as persons interested therein. With regard to these persons, although they may be said to derive title from the mortgagor, they are not in my opinion representatives of the mortgagor in the sense in which the term is applicable to the first Defendant.

9. The question is not infrequently raised in a suit which is subsequent to the suit on the mortgage, and is instituted for the purpose of enforcing the rights of a person who has been made a party Defendant in the mortgage suit. It is not unusual for the Defendant in that suit to urge that the matter is *res judicata*, inasmuch as the Plaintiff might have raised the question of his title in the mortgage suit. An instance of this type of suit is *Sonabannessa v. Abdul Hamid* I. L. R. 58 Cal. 1222 : s. c. 85 C. W. N. 510 (1931). In that suit the Plaintiff, like the first Defendant in this case, had been made a Defendant in a mortgage suit as being the heir of one of the mortgagors. In disposing of the contention that the Plaintiff should have raised the question of her own title in the mortgage suit, *Suhrawardy, J.*, observes :--

If a Defendant in a mortgage suit has a title independent of the mortgage and paramount or adverse to it, he is not bound to set it up in the mortgage suit. I must go further and say that he should not even be permitted to set it up and the Court trying the mortgage suit is not justified in raising an issue of title as between him and the mortgagee.

10. A little later the same learned Judge observes :--

If she had done so (i.e., set up a case inconsistent with the mortgage) the Court

would not have been justified in making such a defence subject of an issue for trial in a mortgage suit which is limited to an enquiry into the validity of the mortgage and the amount due thereon.

11. The principles enunciated in that case appear to me to cover the present case and they are also, in my opinion, good law, and I adopt them in preference to the opposite view taken by the Allahabad High Court in *Nandan Singh v. Jumman I. L. R. 84 All. 640 (1912)*. It follows that the question of wakf cannot be investigated in this suit. Subject to the formal proof of the mortgage and the assignment, against the Defendants who are not appearing, the Plaintiff is entitled to the usual mortgage decree with costs as of a hearing.