

(1917) 07 CAL CK 0015
In the Calcutta High Court

Surendranath Dey and Others

APPELLANT

Vs

Rajindra Chandra Chandra and Another Minors by their
Grandfather and Guardian Jiban Chandra Chandra and Others

RESPONDENT

Date of Decision : 30-07-1917

Acts Referred:

Citation : 43 Ind. Cas. 740

Hon'ble Judges : Beaehoroft, J; Asutosh Mookerjee, J

Bench : Division Bench

Judgement

1. This is an appeal by the plaintiffs in a suit to enforce a mortgage dated the 1st September 1901. Two questions are controversy at this stage, namely, first, is the second parcel subject to an enforceable charge; and secondly, what is the amount still due to the plaintiffs?

2. The property in question originally formed part of a ghatwali tenure. Before the mortgage was executed, an agreement had been made on the 5th August 1901 between the parties to the effect that on resumption the land would be settled with the ghatwal. On the same day, the ghatwal executed a movrasi mukarari kabuliyat in favour of the zemindar, and, on the 17th December 1901, the zemindar executed a mourasi mukarari patta in favour of the ghatwal. The ghatwal, however, was not released from his Police duties till the 17th June 1902. Between the execution of the mortgage and the completion of the resumption proceedings, the ghatwal, on the 19th May 1902, sold the second parcel to the predecessors-in-interest of the contending defendants who, in their turn, on the 31st May 1909, conveyed the property to the respondents. The position taken up by the contesting defendants is that on the date of the execution of the mortgage, the second parcel was still nontransferable ghatwali land, and, consequently, no valid charge was created thereon. This view did not commend itself to the trial Court, and a mortgage decree was made in respect of the disputed parcel as also the other lands included in the security. On appeal, the District Judge took a different view and held that there was no valid mortgage

enforceable against this property. In our opinion, this conclusion cannot be supported.

3. It is not necessary for our present purpose to determine, whether ghatwali property is inalienable in the sense that if it is transferred by the ghatwal to a stranger, the transferor himself is entitled to question the validity of the alienation for whether ghat wali land is or is not inalienable in the sense, our ultimate decision must be in favour of the plaintiffs.

4. The position of the plaintiff cannot be worse than that of a mortgagee of non-existent property. On the 1st September 1901, the ghatwal was entitled to the land, subject to certain restrictions on his right of alienation. These fetters were removed, let us assume, on the 17th June 1902. But in anticipation of such removal, he had executed a mortgage in favour of the plaintiffs. If not immediately operative, the mortgage would, in equity, be operative, at least as an agreement to grant a mortgage. The true position then is best described in the words of Westbury, L.C., in *Holroyd v. Marshall* (1862) 10 H.L.C. 191 : 33 L.J. Ch. 193 : 9 Jar. (N.S.) 213 : 7 L.T. 172 : 11 W.R. 171 : 11 E.R. 999 : 138 R.R. 108.

?It is quite true that a deed which professes to convey property which is not in existence at the time, is as a conveyance void at law, simply because there is nothing to convey. So, in equity, a contract which engages to transfer property, which is not in existence, cannot operate as an immediate alienation, merely because there is nothing to transfer. But if a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a Court of Equity would compel him to perform the contract, and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. This, of course, assumes that the supposed contract is one of that class of which a Court of Equity would decree the specific performance. If it be so, then immediately on the acquisition of the property described the vendor or mortgagor would hold it in trust for the purchaser or mortgagee, according to the terms of the contract.

5. To the same effect are the observations of Jessel, M.R., in *Collyer v. Isaacs* (1882) 19 Ch. D. 342 : 51 L.J. Ch. 14 : 45 L.T. 567 : 30 W.R. 70:

?A creditor had a mortgage security on existing chattels and also the benefit of what was in form an assignment of non-existing chattels which might be afterwards brought on to the premises. That assignment, in fact, constituted only a contract to give him the after-acquired chattels. A man cannot, in equity, any more than at law, assign what has no existence. A man can contract to assign property which is to come into existence in the future, and when it has come into existence, equity, treating as done that which ought be done, fastens upon that property, and the contract to assign thus becomes a complete assignment," see

also Tail by v. Official Receiver (1888) 13 A C. 523 : 58 L.J.Q.B. 75 : 60 L.T. 162 : 37 W.R. 513.

6. These principles were applied in the case of Khobhari Singh v. Ram Prosad Roy 7 C.L.J. 387, where the Court was called upon to decide the validity of a mortgage of property, purchased at a sale for arrears of revenue, the title wherein had not at the time of the execution of the mortgage vested in the auction-purchaser. It was ruled that a mortgage of non-existent property though inoperative as a conveyance is operative as an executory agreement, which attaches to the property the moment it is acquired, and in equity transfers the beneficial interest to the mortgagee without any new act done by the mortgagor to confirm the mortgage. The same doctrine had been previously applied in the cases of Mackinlay v. Dunlop (1850) 1 Tr & B 498 and Baldeo Parshad Sahu v. Mailer 31 C. 667. Reference may also be made to the decisions of the Allahabad High Court in Bansidhar v Sant Lal 10 A. 133pc : A.W.N. (1888) 35 : 6 Ind. Dec. (N.S.) 90 and Gay a Din v. Kashi Gir 29 A 163 pc: 4 A.L.J. 57 : A.W.N. (1907) 7.

7. It is worthy of note that if this view were not adopted, the respondents would have to be left out of the suit as persons who had no interest in the mortgaged property at the date of its institution. If the contention of the respondents is well-founded, on the 19th May 19027 when the ghatwal transferred the disputed property to the predecessor-in interest of the defendants, no title passed from the ghatwal. On the 23rd November 1912, when this suit was instituted, the respondents had not acquired a title by adverse possession. The result would thus follow that the defendants were not proper parties to the suit. This position they are not prepared to accept; they maintain that as soon as the resumption was completed on the 12th June 1902, the title vested in them by virtue of the conveyance of the 19bh May 1902. But precisely the same argument is available to the plaintiffs; and they urge that the moment the resumption was completed on the 12th June 1902, the mortgage of the 1st September 1901 ripened into an unimpeachable transfer. In our opinion, there is no possible escape from the position that there is a valid charge on the second parcel enforceable at the instance of the plaintiffs.

8. We may add that as a last resort, reliance was placed upon the decision in Purna Cuhaha v. Sasidamim Second Appeal No. 1884 of 1903. That case is clearly distinguishable. There the purchaser set up title by purchase at a sale in execution of a money decree. His position accordingly was that he had purchased the right, title and interest of the judgment-debtor as it stood when the attachment was effected. If on that date the judgment-debtor had no valid interest, the execution purchaser acquired no title. Prosonna Kumar Mukherjee v. Srikant Bant 16 Ind. Cas. 365 : 40 C. 173 pc: 16 C.L.J. 202 : 17 C.W.N. 137.

9. In the view we take, it is clear that there is not only a charge on the property, but that the charge covers the original advance as also the money subsequently paid to save the property.

10. The result is that this appeal is allowed, the decree of the District Judge set aside and that of the Court of first instance restored. This order will carry costs both here and in the lower Appellate Court.