
(1925) 07 CAL CK 0032
In the Calcutta High Court

Taraprosad Saw

APPELLANT

Vs

Madhu Sudan Giri and Others

RESPONDENT

Date of Decision : 29-07-1925

Acts Referred:

Citation : AIR 1926 Cal 283 : 91 Ind. Cas. 12

Hon'ble Judges : Cuming, J;Chakravarti, J

Bench : Division Bench

Judgement

Chakravarti, J.—The suit out of which this appeal arises was brought by the reversionary heir of one Govinda Giri on the death of his widow Kausalya in the year 1916 for a declaration that the defendant No. 1 had acquired no title by his purchase at, the sale in execution of a mortgage-decree against the widow.

2. The facts shortly stated are these. One Govinda Giri died in the year of 1868 sonless leaving a widow Kausalya; she lived with Govinda's cousin Tulsaram who was her next reversioner, in her husband's house but Tulsaram drove her away from her house in the year 1891, She brought a suit against Khirode grandson of Tulsaram and recovered a decree for the share of the land which was left by her husband, and it appears that in that suit she was assisted by the present plaintiff and his brothers who were the sister's sons of Govinda.

3. In execution of a decree for mesne profits, against Khirode she purchased Khirode's half share in 1896, and was since then in possession of the entire property consisting of 20 bighas 2 cottahs and 13 chittaks of land. But she was again disturbed in her possession by the present plaintiff and his brothers and was dispossessed of 7 bighas out of 10 bighas of lands which were left to her after she had sold other lands. Then she brought a suit for possession of those 7 bighas against the present plaintiff and his brothers in 1908 and obtained a decree for possession on the 8th December of that year.

4. Now it appears, that Kausalya mortgaged the lands in suit for Rs. 500 in favour of the defendant No. 1 in the benami of one Harnarain on the 25th Sraban

1314 B.S., and then a second bond was executed by her in favour of Taraprosad defendant No. 1 for Rs. 795 on the 13th Magh 1315 B.S. and out of the money so borrowed the money due under the first bond was paid. Taraprosad obtained a mortgage-decree on compromise against Kausalya in August 1909 and the mortgaged properties were sold in execution of the mortgage-decree. This is the sale which the plaintiff challenges in this suit as not binding on him.

5. On the death of Kausalya Madhu Sudan Giri the only surviving son of Govind's sister brought this suit as the reversionary, heir of Govinda Giri for recovery of possession of the lands sole in execution of the mortgage-decree on the allegation that the defendants Nos. 1 and 2 had kept him out of possession of the lands without any right.

6. The defendant No. 1 contested the suit and his main defence was that the mortgages in his favour were executed by Kausalya for legal necessity and therefore, the sale thereunder binds the plaintiff, the reversionary heir, and he further contended that half share of the properties which Kausalya purchased in execution of her decree against Khirode was her stridhan property, to which the reversioner had no claim as it was sold in execution of a decree against Kausalya.

7. The Court of first instance found that there was legal necessity for a portion of the money advanced by the defendant No. 1 but decreed the suit holding that the defendant No. 1 was like a mortgagee in possession and as he had rendered no account of the rents and profits he could claim no right to retain possession against the plaintiff.

8. On appeal by the defendant No. 1 the Additional District Judge affirmed the decree of the Munsif and dismissed the appeal although he found that the amount for which legal necessity was established was larger than the amount found by the learned Munsif. The defendant No. 1 has preferred this second appeal against the decree of the Additional District Judge.

9. Before I deal with the main question as to whether the learned Additional District Judge he s properly applied the principle which applies to a case of legal necessity for alienation by a Hindu widow I shall refer to some of the salient facts which have been found by the Court below.

10. Kausalya inherited about 10bighas of land left by her husband and led a peaceful life till she was dispossessed by Tulsaram, in the year. 1891. She was then plunged in litigation on account of dispossession, by her then reversionary heir and it was in 1894 that she recovered a decree for possession and she was again dispossessed by the present plaintiff at about that time. The learned Munsif to quote his own words found that "Kausalya Bewa got possession of a half share after April 1894, and of the remaining half share after 1896. She was, however, not allowed by her Husband's nephew to be in peaceful possession of the entire land for any long time, She was dispossessed from 7 bighas out of the 10 bighas that was left to her."

11. In 1908 the present plaintiff asserted in the suit brought by Kausalya against him and others that she was in possession of only 3 bighas of land and they were in possession of 7 bighas from 1896 down to 1908. The mortgage-bonds in favour of the defendant No. 1 were executed in 1967 and beginning of 1909. It is clear, therefore, that before the mortgages she had in her possession only 3 bighas of land even after she had recovered the land from Khirode and she had to carry on litigation with the plaintiff for the recovery of the, 7 bighas in his hand, and she obtained hex decree in 1908. It is quite clear, therefore, that she was kept out of possession of her lands, successively by her reversioners. The plaintiff himself kept her out of possession for about 12 years when she executed her first mortgage-bond in favour of defendant No. 1. The legal necessities for the sum of Rs. 500 covered by the bond of 1907 were 1st Rs. 130 for payment of earlier debts due under a mortgage which was satisfied by defendant No. 1, and Rs. 370 taken in cash were said to have been spent: 1st, to meet the expenses of litigations both criminal and civil. 2nd, medical treatment. 3rd, pilgrimage to Gaya. 4th, payment of arrears of rents.

12. The 2nd bond which the defendant No. 1 took was for Rs. 795 out of which Rs. 220 were paid in cash and the balance went in satisfaction of the previous bond. The creditor, therefore, has to establish the legal necessity for Rs. 220 paid in cash. Now the learned Additional District, Judge has found that when the 1st, bond was taken Kausalya had been dispossessed of the major part of her lands but has taken no notice of the helpless condition in which the woman found herself on account of the conduct of her reversioners, the plaintiff being one of them. The learned Additional District Judge has found that all the items of legal necessities except the 4th item did exist hut has assessed the amount of such necessities according to his own view as to the amounts which ought to have been spent for the necessities so found.

13. The total expenses for which the estate was legally chargeable according to the learned Judge amounted to Rs. 350.

14. Agreeing with the Munsif that as the defendant No. 1 was in possession, of the land and had not accounted for the rents, profits thereof the plaintiff should get a decree for possession, the learned Judge dismissed the appeal.

15. The points urged in this appeal are 1st: That the Courts below have erred in holding that the defendant No. 1 the creditor was bound to show what the actual amount spent by the widow was.

16. 2ndly: That the Court of Appeal below was in error in holding that the creditor was entitled to credit not for the sum actually spent but which according to the decision of the Court ought to have been spent by the widow.

17.3rdly: That the Court below having found that legal necessity for the loan existed should not have passed an unconditional decree for possession without directing a refund of the money found to have been borrowed for legal necessity.

18. We think that the judgment of the learned Additional District Judge is vitiated by the erroneous principles which he has applied in the decision of this case.

19. It is now well-settled that a creditor as in this case must prove that legal necessity did exist or that he made proper and bona fide, enquiries as to the existence of such necessity and satisfied himself by all reasonable means as to its existence.

20. The creditor is not bound to see to the application of the money borrowed by a widow when the money was lent for legal necessity: see *Kameswar Pershad v. Run Bahadur Singh* 8 I.A. 8 : 6 C. 843 : 8 C.L.R. 361 : 4 Shome L.R. 81 : 4 Sar. P.C.J. 210 : 5 Ind. Jur. 157 : 3 Ind. Dec. 545 (P.C.). On the question of bona fide enquiries by the defendant No. 1 the learned Judge says "I am not satisfied that the defendant acted bona fide." Then he learned Judge gives his reasons for this view. He thinks that the criminal case could not require Rs. 110 and the kabiraj who treated Kausalya was not so highly qualified as to deserve a fee of Rs. 50 although the kabiraj swore that he did receive that sum as his, fees. The enquiries which a creditor can make is as to the existence of the necessity and also as to the debts she has incurred for a legal necessity and the amount she is in need of for meeting a necessity. It is impossible for a widow in the position of Kausalya to satisfy the creditor as to the actual amount she must borrow for meeting, the future expenses of litigations to which she was driven by the plaintiff himself. In a case like this the Court should be satisfied that legal necessity existed and that the sum lent was not unreasonably large, The transaction should be shown to be genuine and free from doubts of collusion between the creditor and the widow for raising larger sum than was really needed. The interest of the reversioner should, no doubt, be protected but at the same time the widow should not be hampered by unreasonable restrictions in raising money when legal necessity exists.

21. The learned Judge observes that the interest was high but does not take, into, account the risk which the creditor took and the helpless condition, in which the widow was. When the main necessity for the loan was brought about by the wrongful act of the reversioner himself he should not be heard to complain of the high rate of interest more especially when he made no attempt to show that money was available to the widow at a lower rate of interest than was charged in the bond.

22. The existence of the necessities have been,, established by the creditor and as the learned Judge does not find that the consideration money was not paid, the creditor in a case like this has prima facie discharged the burden which lay on him.

23. After finding that the legal necessities alleged by the creditor did exist both Courts enquired not as to what was the money actually needed or was spent by the widow but as to what she ought to have spent. For instance in trying the questions as to what was the amount necessary for the litigation to which the

lady was driven by the plaintiff, the learned Judge takes the amount allowed to her in the decree which she eventually got against the plaintiff for possession of the land as the sum heeded for litigation. Every one acquainted with the costs of litigation in this country knows that the actual amount which a successful litigant gets as costs allowed by the Courts is much less than the factual amount spent by him.

24. In cases where it is shown that the money borrowed was more than the necessity justified then the Court should find whether the creditor knew or could have known by means of enquiries then available that the money was in excess of the necessity and if the finding is in the affirmative then the Court should allow the reversioner to recover the property on payment of the sum really justified by the necessity. If, on the other-hand, the finding of the Court is in the negative, the transaction should be upheld in its entirety. In this connection see the cases of Deputy Commissioner of Kheri v. Khanjan Singh 34 I.A. 72 : 29 A. 331 : 5 C.L.J. 344 : 11 C.W.N. 474 : A.L.J. 232 : 2 M.L.T. 145 : 17 M.L.J. 233 : 9 Bom. L.R. 591 : 10 O.C. 117 (P.C.), Singam Setti Sanjivi Kondaya v. Draupadi Bayamma 31 M. 153 : 3 M.L.T. 251 : 18 M.L.J. 11. Ram Dei Kunwar v. Abu Jafar 27 A. 494 : A.W.N. (1905) 68.

25. In the circumstances of the present case the reversioner, the plaintiff who drove the lady to the litigation for which the money was borrowed must show that the sum which the lady borrowed for the necessity which really existed was in excess of the necessity or that there were means available to the creditor for making an enquiry as to the actual amount needed by the lady or that the amount was excessive to his knowledge. The mere fact that the amount borrowed is to some extent larger than the sum actually needed ought not to vitiate the mortgage. It is impossible to draw a line as to what extent an excess should be held not to vitiate the transaction. In the absence of fraud or collusion between the widow and the creditor, when the necessity for the loan is established, mere excess of the amounts lent should not be held to vitiate the validity of the transaction. When the excess is, disproportionately large, that itself is evidence of collusion then the Court should not uphold the transaction. In cases where the Court finds, that the necessity was inadequate for the entire loan, the reversioner should, be put to terms. The decree for possession should be subject to payment of the sum paid to the widow without interest, the usufruct of the property being set off against the interest. The lower Appellate Court was in error, in treating the defendant No. 1 as a mortgagee in possession and in awarding an unconditional decree for possession to the plaintiff.

26. The judgment and decree of the lower Appellate Court are set aside, the case sent back to that Court so that the appeal may be re-heard in the light of the above observations. The appellant is entitled to the costs of this appeal, the other costs will abide the result.

Cuming, J.

27. I agree.