(1923) 06 AHC CK 0027

Allahabad High Court

Case No: None

Hardeo Sahai		APPELLANT
	Vs	
Inayat Ilahi and Others and Bhawani Prasad and Others		RESPONDENT

Date of Decision: June 6, 1923

Citation: (1923) ILR (All) 692

Hon'ble Judges: Sulaiman, J; Lindsay, J

Bench: Division Bench

Final Decision: Disposed Of

Judgement

Lindsay and Sulaiman, JJ.
First Appeals Nos. 136 and 137 of 1921 are connected appeals by certain defendants arising out of two suits for sale on the basis of two mortgage deeds of she same date, namely, the 2nd of June, 1914.

2. The first of the two mortgage deeds was executed by Bhawani Prasad and others in favour of Hardeo Sahai, and the second by the same mortgagors in favour of Hukam Chand and Gauri Shankar. Under these two deeds the amounts due under two prior mortgage deeds, dated the 16th of June, 1894, and the 1st of March, 1897. were paid off and only a sum of Rs. 500 was paid in cash, which was said to have been required for the purchase of corn for daily consumption and for the completion of the mortgage deeds in question.

3. In the one case the only contesting defendant was a subsequent transferee, Inayat Ilahi; and in the other Maharaj Singh, one of the members of the mortgagor''s family, also contested the suit. The other defendants did not put in any appearance. On behalf of the contesting defendants the execution of the documents as well as the passing of consideration were denied. It was further pleaded that there had been no legal necessity for the transfers, and that the mortgage deeds were-, therefore. not binding on the family.

4. The learned Subordinate Judge was of opinion that it was not open to Inayat Ilahi, he being a transferee only, to raise such a plea, and he further held that the other contesting defendant, Maharaj Singh, not having been born at the time when the two prior mortgage deeds were executed, was not competent to challenge the transactions. He accordingly decreed both the suits in full. Inayat Ilahi and some of the defendants, other than Maharaj Singh, have preferred two appeals, and on their behalf., although the findings as to the execution and the passing of consideration are not challenged, it has been strongly contended that there was in fact no legal necessity for these transfers.

5. The first question which arises is as to whether it is open to the transferee Iriayat Ilahi to raise the question of want of legal necessity. This question, we would have thought, depended on the further question whether a mortgage of joint property by a Hindu father without any legal necessity and not in lieu of any antecedent debt and without the consent, express or implied, of the other members of the family, was void or only voidable. If such a transfer were void, there can be no doubt whatsoever that any subsequent transferee who comes into possession of the property would be entitled to raise the point-that the- transaction was not binding on the property.

6. On the other hand, if the mortgage transaction were merely voidable at the option of the non-consenting members of the family, then it is difficult to see how a subsequent transferee of the property itself could be allowed to question it. A transaction which is voidable remains good so long as it is not challenged by the members who have the option to have it set aside. It is for them to exercise or not to exercise the option. If, without exercising that option and in fact admitting the validity of the mortgage, they transfer the property, the transferee cannot be allowed to say that he has acquired that option by the transfer.

7. Undoubtedly it has been held in a number of cases that a transfer by a Hindu widow, who represents the whole estate for the time being and who certainly has power to transfer the property for her life-time, is only voidable at the'' option of the reversioners and not absolutely void. But as to a Hindu father, the whole estate does not vest exclusively in him but in the family of which he is the head. He may also, as the manager, he the agent of the family in relation to the outside world. The question whether a transfer by him without legal necessity is void or voidable is another matter. There are certainly observations in some old cases which go to show that such a transfer is not absolutely void but only voidable. In the case of Hanuman Kamat v. Hanuman Mandur ILR (1891) Cal. 123 their Lordships of the Privy Council observed at page 126 that the sale by a Hindu father '"'was not necessarily void but only voidable if objection were taken to it by the other members of the joint family."

8. And the same view was expressed by a single Judge of this Court in the case of Bishumbhar Dayal v. Parshadi Lal (1912) 10 A.L.J. 112. On the other hand, the

learned advocate for the appellants relies on the observations in the cases of Balgobind Das y. Narain Lal ILR (1893) All. 339 and Muhammad Muzamil-ullah Khan v. Mithu Lal ILR (1911) All. 783 where it was distinctly held that such a transfer without the consent of the other members of the family was "invalid."

9. Their Lordships in the leading case of Sahu Ram Chandra v. Bhup Singh ILR (1917) All. 437 observed: "any deed of gift, sale or mortgage granted by one co-parcener on his own account of or over the joint family property is invalid; the estate is wholly unaffected by it and it''s entirety remains free of it." It may be that the word "invalid" is not necessarily the same thing as void. We do not, however, think it necessary to go any further into this question as we feel ourselves bound by the ruling of the Fall Bench in Muhammad Muzamil-ullah Khan v. Mithu Lal ILR (1911) All. 783 which laid down that it is open to a subsequent transferee to take the plea that the prior mortgage was without legal1 necessity.

10. The question still remains how far the present transferee Inayat Ilahi is bound by his undertaking to pay off the prior debts. In the sale-deed which was executed on the 6th of January, 1919, in his favour, it was admitted by the vendors in the clearest terms that the prior debts contracted by their ancestors were binding on them. They purported to transfer only the equity of redemption (i.e., property subject to those mortgages) and actually left in deposit with the vendee the whole sum due in order that the same might be paid to the representatives of the prior mortgagees. Having undertaken to pay off these debts, the vendee now turns round and says that he is not bound to pay them, though his sale-deed contains a very clear admission on behalf of all the members of the family who were parties to it that the prior mortgage debts had been incurred for legal necessity and were binding on the family.

11. It is to be noted that 12 years have not yet expired since the execution of the sale-deed. The vendee''s title as against the whole family, therefore, rests on this document alone, that is to say, he must admit that it is under this document that he has acquired the property from the whole family. This, in our opinion, means that the persons who executed the document in his favour were acting on behalf of the whole family. It follows, therefore, that the admission contained in this document must, so far as the vendee is concerned: be taken to be an admission made on behalf of the whole family; and that admission is that the prior mortgage deeds were binding on the family.

12. And, therefore, even though it is true that such an admission cannot operate as an estoppel against the defendant inasmuch as there was no privity of contract between the mortgagees and him, and further because the plaintiff''s position has in no way been compromised, there can be no doubt that this admission is a very strong piece of evidence in favour of the view that the transactions must have- been for valid necessity, otherwise they would not have been accepted as such by all the members.

13. Coming to the facts, we find that the dealings really go back to a very early period. The earliest document that was executed was dated the 22nd of January, 1873, by Hardeo, the grandfather of the present mortgagors, in favour of one Ajit Singh, for a sum of Rs. 98, the whole of which had been paid in cash. It is true that this amount being secured on the family property cannot be treated as an antecedent debt in the strict sense of the term. But it having been borrowed as early as 1873 and evidence as to the actual necessity having disappeared, subsequent admission of its validity would be a very strong piece of evidence to be considered. This deed was followed by a mortgage deed of the 19th of May, 1873, by the same mortgagor, in favour of the same person, for a further sum of Rs. 200, the whole of which was either acknowledged to have been received beforehand or was paid in cash before the Sub-Registrar. The third document was of the 26th of January, 1874, for a sum of Rs. 250, out of which Rs. 113-8-0 were given credit for on account of the amount due on the first-mentioned document and Rs. 136-8-0 were received in cash. The fourth mortgage was for a sum of Rs. 400, under which Rs. 229 were paid off on account of the amount due under the deed of the 19th of May, 1873, and a sum of Rs. 171 was received in cash. There is a recital in this document that this sum of Rs. 171 was required for the purpose of paying government revenue for the June instalment and for meeting certain personal expenses.

14. The fifth document was dated the 5th of January, 1875, for a sum of Rs. 400, under which the earlier document of the 26th of January, 1874, was paid off and a further sum of Rs. 118 was, advanced. Then we have the document of the 5th of August, 1875, under which the fourth and fifth mortgage deeds were paid off and the balance was received in cash. All these transactions are transactions entered into by Hardeo, the grandfather of the mortgagors, as early as the seventies.

15. On the 31st of January, 1887, a mortgage by conditional sale for a sum of Rs. 3,100 was executed in favour of the same mortgagee, Ajit Singh, under which he was put in possession of the mortgaged properties, and the amount due on the earlier document of the 5th of August, 1875, was paid off. There is a further recital in this document that Rs. 505-7-3 were due on account of a Munsif''s court decree and Rs. 64-8-9 were due on account of prior debts. Rupees 150 were paid in cash. There can be no doubt that this mortgage by conditional sale was fully acted upon and the mortgagee entered into possession soon after. He and his representative have been in possession of the property since then, which means, that, during the whole of a period of over thirty years the mortgagors'' family has allowed this property to remain out of its possession.

16. On the 16th of June, 1894, another mortgage deed was executed by Durga Prasad, Munna Lal and Bhawani Prasad, the sons of Hardeo, in favour of one Musammat Lachmi Bai, for a sum of Rs. 6,400. Under this document Rs. 6,100 were left with the mortgagee to pay off the mortgage by conditional sale, the validity of which was of course accepted, and Rs. 300 were acknowledged to have been

received in cash. There can be no doubt that subsequently Musammat Lachmi Bai, the mortgagee, paid off the prior mortgage and entered into possession of the property in place of the previous mortgagee. On the 1st of March, 1897, another mortgage deed by the same three persons was executed for a sum of Rs. 900 and the recital is to the effect that the money was required to pay off a decree for arrears of rent held by Chaudhri Sundar Singh and another and to meet certain personal expenses. The property hypothecated under this bond was the same as that covered by the mortgage by conditional sale.

17. Up to the year 1914 no attempt was made by any member of the mortgagors'' family to challenge any of these mortgage deeds or to recover the property from the possession of the mortgagees. The family seems to have acquiesced in these transfers. A third party would, therefore, be quite justified in presuming that the debts must have been incurred for family necessity. On the 2nd of June, 1914, six members of the family, namely, (1) Bhawani Prasad, acting in his own right and as guardian of his sons Bansi Dhar and Raghubar Singh, (2) Gaya Prasad, (3) Kalka Prasad for self and as guardian of his minor son Sarup Singh, (4) Murlidhar, (5) Sheo Narain for self and as guardian of his minor sons Sughar Singh, Babu Kam and Chute Tua and (6) Sanet Singh in his own right and as guardian of Maharaj Singh, executed the documents in suit under which the amounts due under the previous mortgage deeds of 1894 and 1897 mentioned above were left with the mortgagees to be paid off and the balance of Rs. 500 was said to have been required for purchasing corn for daily consumption and meeting the expenses of the execution and the registration of the deeds.

18. It was some years after these mortgage deeds that Inayat Ilahi obtained a sale-deed on the 6th of January, 1919, in which there was a fresh admission on behalf of the mortgagors'' that the two mortgage debts in question had been validly incurred and were binding on the family.

19. It is true that in a case where a mortgagee wishes to enforce a charge against the family property, the burden lies on him to satisfy the court that the mortgage transaction had been entered into for family necessity or in lieu of antecedent debt or with the consent, express or implied, of all the members of the family. In the present case we are of opinion that this'' burden has been sufficiently discharged. In the first place, the transactions extend back to the year 1873 and for all this long period there never has been any protest made by any member of the family. Furthermore, there is nothing to show that in the years 1894 and 1897 there were any major members of the family alive who were not parties to the transactions and whose consent ought to have been obtained and was not obtained. In fact the ages of the various defendants as given in the plaint would rather go to show that all of them or at least most of them were not even born in those years. A long series of renewals of mortgage transactions extending for over a generation without any protest by any member of the family would show, its acquiescence, and raise a fair

presumption that if there had not been a valid necessity for them, some objection would have been raised. The present mortgagees were not the mortgagees in the years 1894 and 1897, and so it is not a matter within their special means of knowledge as to whether the amounts borrowed on those dates had been incurred for legal necessity/ In view of the long continued acquiescence of all the members of the family, at any rate by all the adult members of the family, and the express admission contained in the sale-deed of the 6th of January, 1919, we are of opinion that it must be held ''that in this case the burden of proof of legal necessity has been completely discharged. It is not now possible, after the lapse of so many years, to produce evidence to show for what purpose the money was borrowed or how it was actually spent by the mortgagors. All that the mortgagees are required to show is that like ordinary men they were reasonably satisfied ''that legal necessity must have existed. In view of the conduct of all the members of the family in allowing the property to remain out of their possession for such a long time we think that this must be taken to have been so. Even though all these sums were borrowed on the security of the family property and although there is no direct evidence to show the actual necessity to meet which all the sums were borrowed, we are of opinion that the burden of proving the existence of legal necessity must be held to have been discharged. It was to pay off these debts, and in that way to recover the property from the mortgagees, that the mortgage deeds in suit were executed. The family cannot now be allowed to retain the benefit and repudiate the liability.

20. We think it right to note that in the court below, with the exception of the transferee, only one defendant Maharaj Singh contested one of the suits. All the other defendants did not put in any appearance nor filed any written statement. The question of want of legal necessity was a mixed question of law and fact and none of these defendants ever attempted to raise it. None of them went into the witness box to explain away their own admissions. The plaintiffs produced some oral evidence also, which, under the circumstances, we do not propose to discuss. After the decrees in the two suits were passed, Maharaj Singh, the only defendant who was a member of the family, submitted to the decrees and has not appealed. The ''persons who now appeal are the transferee Sheikh Inayat Ilahi and certain other defendants who did not put in an appearance in the court below and who did not raise the question at all. Their reluctance to submit themselves to cross-examination suggests to some extent that they did not feel confident that they would be able to explain their previous admissions. -The evidence of Jhau Lal and Hardeo Sahai is to the effect that Rs. 500 were taken to meet private expenses and the expense of registration. The recital in the deed is to the same effect. The defendants have given no oral evidence to rebut it. Their own evidence would at least have shown for what purpose Bs. 500 were required. Neither the transferee nor these other defendants, who never contested the claim, can, therefore, succeed. The result is that both these appeals fail and are hereby dismissed with costs.