Banarsi Prasad Vs Basti Begam and Mumtaz Ahmad and Others

Court: Allahabad High Court

Date of Decision: March 28, 1908

Citation: (1908) ILR (All) 297

Hon'ble Judges: John Stanley, C.J; William Burkitt, J

Bench: Division Bench

Final Decision: Disposed Of

Judgement

John Stanley, C.J. and William Burkitt, J.
The question in this appeal was strenuously and ably argued by Mr. Dillon on behalf of the

appellant, and is one of some nicety and difficulty. The plaintiff respondent, Lala Banarsi Prasad, instituted the suit out of which it has arisen to raise

the amount due to him on foot of a mortgage of the 29th of October 1897 by sale of the mortgaged property. There was a prior document of the

23rd of October 1897 purporting to be a mortgage of a portion of the property executed by the mortgagor Mumtaz Ahmad in favour of Husain Ali

Khan, the husband of the defendant appellant Musammat Basti Begam. This mortgage is found to have been fictitious and without consideration,

and to have been made by Mumtaz Ahmad solely for the purpose of defeating his creditors. But Husain Ali Khan transferred it to his wife

Musammat Basti Begam on the 15th of August 1898 in satisfaction of portion of her dower debt, and it has been found on issues referred by this

Court for determination to the lower appellate Court that this was a bond fide transaction and that Musammat Basti Begam obtained the transfer of

the mortgage without any knowledge of its fraudulent character and was a transferee in good faith and for consideration. This is a finding of fact

which we must accept in second appeal. Dower was due to her at the time, and it was in consideration of a portion of the dower so due that the

transfer was made.

2. Both the Courts below held that as the mortgage in favour of Husain Ali Khan was bad in law his assignee could not derive any benefit from it.

The learned District Judge in his judgment says: ""We may take it that dower was actually due to Musammat Basti Begam and that she was a

transferee in good faith, but still I do not think Musammat Basti Begam is entitled to any payment from the plaintiff. Section 53 of the Transfer of

Property Act, on which apparently the appellant relies, is not, I think applicable. I take it that the last paragraph can only apply in cases where

there is some property capable of being transferred to the transferee in good faith.

3. The mortgage of the 23rd of October 1807 was registered on the 29th of that month, the date of the plaintiff''s mortgage, and the plaintiff had no

notice of it when he obtained his mortgage. The plaintiff''s mortgage was registered on the 22nd of March 1898.

4. The question is whether the sham mortgage of the 23rd of October 1897 takes priority of the plaintiff''s mortgage by reason of the fact that

Musammat Basti Begam took a transfer of it in good faith in satisfaction of part of her dower. Mr. Dillon on her behalf relied upon the last clause of

Section 53 of the Transfer of Property Act, which deals with transfers of immovable property made to defeat, amongst others, the creditors of a

transferor, and the last paragraph of it provides that ""nothing contained in this section shall impair the rights of any transferee in good faith and for

consideration."" He relied upon the case of Halifax Joint Stock Banking Company v. Gledhill [1891] 1.Ch. D. 31, in which Section 5 of 13 Eliz.,

Cap. V., corresponding to Section 53 of the Transfer of Property Act, was considered. In that case, by a settlement which was fraudulent against

creditors under 13 Eliz., Cap. V., a reversionary life interest was reserved to the settlor, who subsequently charged his life interest by way of

equitable mortgage in favour of a mortgagee who advanced his money without notice that the settlement was fraudulent. It was held in a suit by the

creditors to have the settlement declared void that the interest of the equitable mortgagee was protected by Section 5 of the Act. In that case the

property put into settlement consisted of real estate and a policy of assurance, and these properties were conveyed and assigned to a trustee upon

trust for the wife of the settlor for her life, and afterwards for the settlor for life, and subject thereto for the settlor''s children. The contention in that

case on behalf of the plaintiff was that the mortgagee could have no better title than his assignor unless he could bring himself within the provisions

of Section 5 of the Act; that he was not a purchaser for value without notice within the protection of that section, as it related only to purchasers

claiming directly under the deed which is impeached, and not to persons who subsequently purchased an interest derived under it. Kay, J., held

that Section 5 includes a purchaser for value without notice of any interest under the deed impeached, whether that interest be legal or equitable,

and prevents the deed being void as against such purchaser, and that inasmuch as the mortgagee took a deposit of the settlement from the trustee

and settlor, the result was that he obtained such interest as the settlor could give him if the settlement had Been valid.

5. It is to be observed in this case that the impeached document was a conveyance and not a mortgage, and that creditors of the settlor, and not,

as in the case before us, a bond fide mortgagee, were the plaintiffs. Only one or two cases were cited to us during the argument, but we have had

an opportunity since the hearing of looking closely into the authorities. In the case of Cockell v. Taylor (1851) 15 Bea. 103 the facts were these.

One Collett executed a mortgage of a portion of a fund in Court in favour of one Preston. Preston obtained an advance from Taylor on the security

of the mortgage. The mortgage was found to be fraudulent and void as between the parties to it, but Taylor was not at all cognizant of any fraud or

irregularity having been practised on the mortgagor. He had no notice of anything doubtful or questionable in the transaction creating the mortgage

and his contention was that he was entitled to hold the original mortgage security as valid to the extent of the moneys advanced by him on the

security. On the other hand it was contended that the rule of equity is that a man who purchases a chose in action does so subject to all the equities

which attach to it, and consequently Taylor bought the interest which wag assigned to him subject to the possibility of its being proved thereafter

that somebody else had a better title to it than his assignor, or that his assignor"s title to it was itself worth nothing. Romilly, M.R., held that the sub-

mortgage was void. In his judgment he remarks: ""It has not been disputed nor can it be doubted that the purchaser of a chose in action does not

stand in the situation of a purchaser of real estate for valuable consideration without notice of any prior title, but takes the thing bought subject to all

the prior claims upon it. If therefore the share of the plaintiff Collett in the fund in Court had been charged with a sum to another person unknown

to Taylor, Taylor would have taken this interest in the fund subject to that charge. The question here raised arises from the circumstance that the

prior equity is an equity in the assignor of the chose in action to dispute and set aside that assignment on the ground of fraud; and it is suggested

that, although there be not any doubt or question as to the general rule, yet that this must be taken with some qualification when the person himself

who asserts the equity has created the interest under which the assignee of the chose in action claims it. But I have not come to that conclusion. I

cannot on this ground draw any distinction between the different sorts of equities affecting a chose in action or. alter their priorities. Assuming as I

do for the purpose of this present argument that the plaintiff Collett has a prior equity to this chose in action, and that the title to it of the person

through whom Taylor claims is either void or subject to that of the plaintiff, the circumstance that the plaintiff has been induced to create or

countenance such title by instruments which the Court holds to be void, will not in my opinion postpone or alter his original title. In saying this and

in assuming that the plaintiff has this equity now subsisting, it is obvious that I must for that purpose assume that the conduct of the plaintiff has not

affected this right, which is a question still remaining to be considered; hut, assuming that I am right in my decision that the original mortgage of

December 1848 is void as against the plaintiff, and that he has done nothing to countenance any subsequent dealing with it, I am of opinion that

third persons cannot, by innocently dealing with the person who improperly obtained the mortgage, acquire any equity against the plaintiff."" This

was a mortgage of a fund; but it seems to us that the same principle is applicable to a mortgage of land as to a mortgage of personal estate. In

equity a mortgage is in fact no more than a debt the payment of which is secured by the hypothecation of movable or immovable property.

6. In the case of Ogilvie v. Jeaffreson (1860) 2 Gif. 353 the facts were these. The plaintiff James Ogilvie, who was the mortgagee of four leasehold

houses, was fraudulently induced by his solicitor to execute certain deeds, represented to be leases, but by which, in consideration of a sum of

money never in fact paid, the plaintiff was made to assign the premises by way of sale to a female servant, by whom they were afterwards

mortgaged for value to the defendants. Ogilvie filed a bill to set aside these deads, and the Court held that they were wholly void, and decreed that

they be delivered up to be cancelled. The defendants resisted the suit on the ground that they were purchasers for value without notice by a title

derived under the deeds which the plaintiff had been fraudulently induced to execute. The Vice-Chancellor in delivering judgment remarked that

the defendants being well aware that the plaintiff had been mortgagee were bound to know all the particulars of his security from which the title

offered to them was derived."" Referring to the defence of purchase for value without notice he referred to the case of Strode v. Blackburne (1796)

3 Ves. 222, in which Lord Rosslyn stated that such a defence was a shield to protect the possession of property and was not available in any case

except to protect the actual possession, and also to the judgment of Lord Eldon in the case of Wallwyn v. Lee (1803) 9 Ves. 24 rejecting the

doctrine so propounded by Lord Rosslyn and holding that possession by the purchaser was not necessary, provided he purchased from an

apparent owner who was actually in possession, and then he pointed out that the defendants could only show that they claim as purchasers for

valuable consideration from Catherine Jones (the female servant) who had no possession, nor any apparent possession of anything, and who in the

cause disclaimed any ownership or estate in the property which the defendants alleged she mortgaged to them, and then he observes: ""On the

whole case it appears that the plaintiffs claimed to be purchasers from one who was in possession of nothing, who was apparent owner of nothing,

who could convey nothing, and never received anything, who was merely named as grantee in a deed, the execution of which was obtained by

fraud and imposture and without any knowledge by her that she was acquiring anything, or any intention or wish on her part to have or acquire any

such estate or interest as the fraudulent deed affects to convey to her."" This case has a close bearing on the case before us. The plaintiff in it was

not indeed in so strong a position as the plaintiff here.

7. The ruling in the two cases lastly quoted, as also that in Parker V. Clarice (1861) 30 Bea. 54, if it be good law, is decisive, we think of the

appeal before us. In that case one Cruchley conveyed all his interest under a will to secure a sum of Ã¯Â¿Â½95. The mortgage was executed while

Cruchley was in prison for debt, and the Court came to the conclusion that it was given without consideration and under a promise to release the

mortgagor from prison which was never performed. Seven days after the execution of this mortgage Thomas transferred it to the defendant Clarke,

who had notice of the circumstances under which it had been obtained, and some years after-wards Clarke deposited the mortgage and transfer

with one Philips to secure the payment of moneys due and to become due to him. Philips had no notice of the circumstances under which the

mortgage had been obtained. A bill was filed against Clarke and Philips for a declaration that the mortgage deed was void and for an order for its

delivery up to be cancelled. On behalf of the plaintiff it was contended that the deed was void and Philips having a mere equitable title to what

might be due on the mortgage could only claim such interest as Clarke was entitled to. On behalf of Philips it was argued that he was a purchaser

for valuable consideration without notice and that he was entitled to hold the deed until he had been paid what was due to him; that the mortgagor

having enabled Clarke to obtain money on the faith of this deed could not set it aside without paying what had been actually advanced on it by

Philips. Sir John Romilly, M. R., held that, no consideration having been given for the mortgage, as against Clarke, it must be delivered up, to be

cancelled, and with respect to Philips that he could only take what Clarke had given him and could not be in a better position than Clarke himself;

that Philips must deliver up the deeds and that his only remedy would be against Clarke.

8. Kekewich, J., dissented from this ruling in the case of French v. Hope (1887) 56 L.J.C. D. 353 the facts of which were as follows. In April

1883 the plaintiff in order to raise money executed in favour of his solicitor Hope a mortgage in fee to secure Ã¯Â¿Â½200, a receipt for that sum being

endorsed; but no money having been paid to the plaintiff. A few months afterwards the mortgagee deposited the mortgage and title deeds wish

Messrs. Shum, Crossman & Co. to secure an advance of Ã¯Â¿Â½100 to himself, Messrs. Shum, Crossman & Co. having no knowledge of the

circumstances under which the mortgage was obtained by Hope. It was held that as between the plaintiff French and Shum, Crossman & Co. the

equity of the latter must prevail and that they were entitled to rely upon their security for the Ã¯Â¿Â½100 and interest. In his judgment Kekewich, J.,

referring to the case of Parker v. Clarke, said that he must hold that it was overruled by the decision of the Court of Appeal in Bickerton v. Walker

(1885) L.R. 31 Ch. D. 151. The facts of that case were these: On the 10th of February 1879 the plaintiffs mortgaged to one Bates for Ã¯Â¿Â½250

their equitable interest in a sum of stock and also certain policies of assurance, and in the mortgage deed acknowledged the receipt of Ã¯Â¿Â½250 and

also signed a receipt for that sum endorsed on the mortgage deed. On the 11th of March 1879 Bates transferred the mortgage to Hunter, who

gave full value for it as a mortgage for Ã¯Â¿Â½250 and had no notice that the plaintiffs had not received that sum. The plaintiffs brought their suit

alleging that they had only received Ã¯Â¿Â½91, and not Ã¯Â¿Â½250 and asked for redemption on payment with interest of what they had actually received,

It was held that as against Hunter, who had no notice that the whole Ã¯Â¿Â½250 had not been advanced, the account must be taken on the footing of

its having been advanced, for that in the absence of any circumstances to cause suspicion, he was entitled to rely on the acknowledgment contained

in the mortgage deed and the endorsed receipt, and had a better equity than the plaintiffs, who, by leaving the documents in the hands of Bates,

had enabled him to commit a fraud. Bacon, V.C., held that the account was to be taken on the footing of Ã¯Â¿Â½250 having been advanced to the

plaintiffs. An appeal was preferred which came before Sir James Hanen and Bowen and Fry, L.J.J., and on behalf of the appellants it was

contended that a mortgage can only be enforced by a transferee to the same extent as it might be enforced by the original mortgagee and that a

transferee takes subject to the account between the mortgagor and mortgagee. The Court dismissed the appeal. Fry, L.J., in delivering the

judgment observed: ""He (Hunter) must on the evidence before us be taken to have advanced his money on the faith of the production of the

mortgage deed and receipt signed by the plaintiffs and if the assignment by the plaintiffs had been not a mortgage but an absolute conveyance, it

would, we think, have been clear that there would have been no negligence whatever on the part of the defendant Hunter in not enquiring of the

plaintiffs as to their rights or claims. But it has been argued before as that there is a wide difference in this respect between a mortgage and an

absolute conveyance, because, it is said, and said truly, that in the ordinary course of business a prudent assignee of a mortgage before paying his

money requires either the concurrence of the mortgagor in the assignment or some information from ""him as to the state of accounts between

mortgagor and mortgagee. The reason of this course of conduct is however in our opinion to be found in the fact that an assignee of a mortgage is

affected by all transactions which may have taken place between mortgagor and mortgagee subsequently to the mortgage and the assignee is

bound to give credit for all moneys received by his assignor before he has given notice of the assignment to the mortgagor."" Then he points out that

in the case before them the assignment was executed soon after the execution of the mortgage, and before the time for payment had arrived and

that it was not probable that any payment would have been made either of principal or interest) in the meantime, and that the transferee was

justified in relying upon the solemn assurance under the hand and seal of the mortgagor as to the real bargain carried into effect by the mortgage

deed, upon the possession of that deed by the mortgagee and upon the receipt for the full amount of the mortgage money under the hand of the

mortgagor. Now we may point out that in this case there was a valid and binding mortgage, the only matter in dispute being the amount payable to

the transferee under it; also that the competition was between the mortgagors and a transferee from the mortgagee. The Court held that the

conduct of the mortgagors, in acknowledging in the mortgage the receipt of the entire mortgage debt and giving a receipt for it, precluded them

from raising the case that the entire amount of the mortgage had not been advanced. They followed the general lines laid down by Kindersley, V.

C., in Rice v. Rice (1853) 2 Dre 73 and say: ""For the solution of the particular question which distinguishes this case from that, viz., whether there

is for this purpose any difference between a mortgage and an absolute conveyance, we have not) been aided by any authority cited to us at the

Bar."" Parker v. Clarke was cited in this case, but we find no reference to it in the judgment, much less any adverse comment upon the ruling in it, In

Rice v. Rice, the case referred to by Fry, L.J., a vendor conveyed certain property without receiving the purchase money, but a receipt for it was

endorsed on the deed and the title deeds were delivered over to the purchaser. The purchaser then made a mortgage by deposit and absconded,

and it was held as between the vendor''s lien for his unpaid purchase money and the right of the mortgagee that the possession of the title deeds,

and the fact of the endorsement of the receipt on the deed gave the mortgagee the better equity. In his judgment Kindersley, V.C., observed:

Upon a comparison then of the conduct of the two parties and a consideration of all the circumstances of the case and especially the fact of the

possession of the deeds which the mortgagee acquired with perfect bona fides and without any wrong done to the mortgagors, I am of opinion that

the equity of the mortgagees is far better than that of the vendor and ought to prevail."" The two cases therefore lastly referred to were decided after

weighing the conduct of the parties and the equities arising therefrom. In Bickerton v. Walker there was a valid mortgage. In French v. Hope the

mortgagor was estopped by his conduct from relying on the want of consideration for the mortgage as against the sub-mortgagee. In the case

before us the defendant appellant derives her title under a sham and fictitious document purporting to be a mortgage. At the date of the execution

of the mortgage of the 29th of October 1897 in favour of the plaintiff she had no interest in the property, and her husband also took none under the

fraudulent mortgage made in his favour. It does not appear that Musammat Basbi Begam made any inquiry of the mortgagor when she took the

assignment, and previous to that date the plaintiff bad obtained his security, and this security had been duly registered. Husain Ali Khan had not at

any time any interest in the mortgaged property. He had nothing to convey to his wife. The equity, if any, which sprung up in her favour when she

took the transfer was against the mortgagor Mumtaz Ahmad. She had no equity against the innocent mortgagee Banargi Prasad whose mortgage

was prior in date to the transfer in her favour. Even if Parker v. Clarke is to be treated as overruled, the appeal ought not, we think, to prevail. The

plaintiff''s equity is prior in date to that of the defendant appellant, and on the principle qui prior, est tempore potior est jure the plaintiff has, we

think, the better equity.

9. The transfer of the fictitious mortgage to Musammat Basti Begam, notwithstanding that it was made bond fide and for valuable consideration,

did not, we think, validate the security as against the plaintiff. Basti Begam took the transfer subject to all defects in the title of her transferor and

cannot in equity set up the fictitious document against a bond fide mortgage. The fictitious instrument received, we think, no new force against the

plaintiff from the transfer. The ''proviso to Section 53 of the Transfer of Property Act, which was relied on by Mr. Dillon, does not appear to us to

help his client. That proviso was intended to safeguard rights which have been already acquired. A purchaser for value must be the purchaser of

something. Husain Ali Khan had no interest in the mortgaged property under the fictitious mortgage made to him. He had nothing therefore which

he could transfer to his wife, and if the latter had made inquiry of the mortgagor she would probably have learnt that the mortgage was fictitious and

colourable. On the main question therefore the appeal fails.

10. It remains to consider whether Musammat Basti Begam has any remedy against Mumtaz Ahmad. In the third ground of appeal she claims that

some relief should have been given to her as against him. This point was not specifically dealt with at the hearing. We are disposed to think, upon

the principle laid down in Rickerton v. Walker, that if she desires to enforce the fictitious instrument as against Mumtaz Ahmad the mortgagor she

is entitled to do so. He by his fraudulent act placed it in the power of Husain Ali Khan to defraud his wife, and as against her Mumtaz Ahmad

cannot be heard to say that the mortgage was fictitious and colourable. We therefore think that if there be any balance out of the proceeds of the

sale of the mortgaged property after satisfying the claim of the plaintiff and all prior charges, such balance should be applicable to payment of the

amount of the consideration named in the transfer made in favour of Musammat Basti Begam with interest. Possibly the lower appellate Court

intended to give her this relief, for we find in the decree a direction that the balance of the proceeds of sale after payment of the sum found due to

the plaintiff should be paid to the defendant"" or other persons entitled to receive the same.

11. We direct that the decree be accordingly modified. In other respects, we affirm the decision of the lower appellate Court, and as the appellant

has substantially failed in her appeal, we dismiss it, pave as aforesaid, with costs.