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**(1950) 07 AHC CK 0010**

**Allahabad High Court (Lucknow Bench)**

**Case No:** Second Appeal No. 76 of 1945

Girja Shankar and Others

APPELLANT

Vs

Jagannath and Others

RESPONDENT

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**Date of Decision:** July 27, 1950

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 6 Rule 2, Order 6 Rule 6
- Transfer of Property Act, 1882 - Section 43

**Citation:** AIR 1952 All 301

**Hon'ble Judges:** Malik, C.J

**Bench:** Single Bench

**Advocate:** N. Banerji, for the Appellant; H.D. Srivastava, for the Respondent

**Final Decision:** Allowed

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### **Judgement**

Malik, C.J.

One Ram Nath executed a simple mortgage on 8-11-1930 in favour of Jagannath plaintiff. In the mortgage deed a 1/6th share in certain properties was included. The mortgage was for Rs. 700 and the amount was payable after one year. On the date of the mortgage Ram Nath was, however, owner of only a 1/9th share in the mortgage. In 1932 Ram Kumar, nephew of Ram Nath, died and Ram Nath inherited a 1/18th share in the property from Ram Kumar and thus became the owner of a 1/6th share of the property. Thereafter Ram Nath died and on 17-5-1933, the widow of Ram Nath as guardian of her minor sons defendants 1 and 2 executed a mortgage in favour of defendants 3 and 4. The mortgage was of a 1/18th share in the same property. In this mortgage deed no mention was made of the first mortgage. Jagannath, plaintiff, filed a suit on the basis of the mortgage dated 3-11-1930, out of which this appeal has arisen, for sale of the 1/6th share included in his mortgage. Defendants 1 and 2 did not defend the suit, but defendants 3 and 4 took up the plea that their 1/18 share of the property was not saleable, as Ram Nath was the owner of only a 1/9th share when he executed the mortgage dated

3-11.1930.

2. The plaintiff met this plea by alleging that Ram Kumar had died before 1930 and on the date of the mortgage in plaintiff's favour Ram Nath was in fact the owner of the 1/6th share that was mortgaged to him. The trial Court, however, came to the conclusion that Ram Kumar died in 1932 and on the date of the mortgage Ram Nath was the owner of only 1/9th share. The trial Court, therefore, decreed the plaintiff's suit for sale of the 1/9th share which had belonged to Ram Nath.

3. On appeal by the plaintiff the lower appellate Court allowed the appeal and held that the whole of the 1/6th share was liable to be sold in satisfaction of the amount due under the first mortgage. The defendants 3 and 4 have filed this second appeal. It is urged on their behalf that the only case set up by the plaintiff being that Ram Nath was the owner of a 1/6th share in the property on the date of the mortgage, and the mortgage was, therefore, good and there being no other alternate case set up, nor there being any issue on the question whether the defendants had any notice of the first mortgage or of the option, the defendants were prejudiced by the plaintiff being allowed to rely on a case which they had never pleaded and on which there was no issue. The issues framed by the trial Court were as follows:

(1) Is Ex. 1 genuine ?

(2) Are the defendants 3 and 4 subsequent transferees?

(3) Is the suit against defendant 4 barred by time?

(4) To what relief if any is the plaintiff entitled ? It is clear, therefore, that there was no issue on the question whether defendants 3 and 4 were transferees in good faith and for consideration.

4. The lower appellate Court, however, took the view that the first mortgage being a registered mortgage, the second mortgagee must be deemed to have had notice of the first mortgage and if defendants 2 and 4 had notice of the mortgage it must be held that they had notice of the option.

5. It is no longer denied that Ram Kumar died in the year 1932 and on 3-11-1930 Ram Nath had only a 1/9th share in the property and not a 1/6th share. He could not, therefore, make a mortgage of the difference i. e., 1/18th share. There was consequently no valid mortgage of the 1/18th share. On the equitable doctrine of feeding the estoppel, which is incorporated in Section 43 T.P. Act, the mortgagee will be entitled to proceed against the entire property mortgaged, if the mortgagor after the date of the mortgage became the owner of the entire property. Upto here the position is very simple. The difficulty arises when a legal title is subsequently created. Against such a subsequent transferee, notice of the previous equitable claim must be brought home before the equitable claim can be enforced against him.

6. It may be useful to put down here the successive steps of the processes of reasoning by which the result is reached, and I may well borrow the language of the Hon<sup>ble</sup> Judges in [Cheta Bahira Saheba Vs. Purna Chandra Choudhuri and Others](#) .

(1) a contract by X, for valuable consideration to assign property to be acquired by him whether it is expressed as a contract or whether it takes the form of an immediate assignment, merely binds X, personally, until the property comes into existence;

(2) when X acquires property which comes within the scope of the contract, that property is bound; X becomes a trustee of it for the assignee, who acquires an equitable interest therein, and it is not necessary, that any fresh act should be done by X to perfect such equitable interest of the assignee;

(3) the interest acquired by the assignee in after-acquired property when it is acquired, is an equitable interest; as such it is not available against a purchaser for value without notice of a legal interest in the property."

The second part of Section 43 T.P. Act which is as follows:

"Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option."

merely incorporates proposition No. (3) mentioned above, i. e., a purchaser for value of a legal interest in the property is not affected unless he had notice of the interest acquired by the assignee in after-acquired property when it is acquired.

7. The question of some importance is, what is the exact form of notice that the subsequent transferee should have to enable the equitable interest to be enforced against him. The lower Court has assumed notice of the prior mortgage even though there was no issue on the point. As the prior mortgage was a registered document the lower Court has assumed that the subsequent mortgagee must be deemed to have had notice of the same. Section 43 T. P. Act is as follows :

"Where a person fraudulently or erroneously represents that he is authorised to transfer certain Immovable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.

Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option."

It is suggested that it must be established that the transferee had exercised his option before the equitable interest can operate on the property transferred but subsequently acquired. I do not think the section requires that after the transferor has acquired title in the property the transferee must immediately give him notice that he proposes to hold him bound by the agreement and that it is the exercise of

this option that the subsequent transferee must have notice of before he can be bound. It is true that in the second part of the section, it is not said that the second transferee should have had notice of the existence of the said option." But I do not think it is necessary to establish that the second transferee had known that the transferor's title was defective on the date of the transfer, that the transferor later acquired interest which he had previously purported to transfer and that the transferee had elected to hold the transferor bound by his agreement. If that were so, then the mere fact that the second transferee knew of the first transfer would not be enough and it would be further necessary for him to know that the transferor's title on the date of the transfer was defective and he had subsequently acquired interest which he had purported to transfer. This could not be the law. A second transferee, if he knew of the first transfer and did not know of the defect in the transferor's title, must have agreed to take the second transfer subject to the first. I do not see why the second transferee's want of knowledge of the defect in the transferor's title at the time of the first transfer should place him in a better position. To me the phrase "notice of the existence of the option" have been used as the first transferee who has an equitable interest only has nothing more than an option to proceed against the property included, in his transfer, it being merely an equitable right and not a transfer of a legal interest. The subsequent transferee must be deemed to have had notice of the existence of the said option if he had knowledge of the previous transaction. If it were necessary to decide this point I would have referred the case for decision by a larger bench, but the point not having been taken in the pleadings and there being no issue on the point I do not think the lower Court was justified in assuming that the second mortgagee had notice of the first mortgage specially when the first mortgage qua 1/18th share in the property was bad and conveyed merely an equitable interest. This is specially so as the second mortgage was not made subject to the first mortgage and there was no mention in the second mortgage deed of the first mortgage. On the findings recorded by the trial Court the first mortgagee's interest and (sic) was not legal interest and unless, therefore, the second mortgagee knew that the 1/18th share mortgaged to him had been mortgaged to Jagannath under the first mortgage of 3-11-1930, it could not be said that he had notice of the equitable interest.

8. Learned counsel has urged that there is nothing to show that this 1/18th share, which was included in the mortgage of 17-5-1933 is not a part of the 1/9th share which belonged to Ram Nath on 3-11-1930. The share which Ram Nath owned on 3-11-1930, belonged to him and if the second mortgage by his legal representatives was out of that 1/9th share, it could not be described as free from any previous mortgage. It must, therefore, be assumed that the property included in the second mortgage was intended to be property on which there was no previous legal mortgage. Even this point was not urged in the lower Courts.

9. The result, therefore, is that this appeal is allowed, the decree of the lower appellate Court is set aside and the decree of the trial Court restored. The appellants

will get their costs of this Court and the lower appellate Court.