

(1918) 07 CAL CK 0032

Calcutta High Court

Case No: Appeals From Appellate Degrees Nos. 1499, 2151 and 2152 of 1916

Sm. Ishani Dasi and Another

APPELLANT

Vs

Ganesh Chandra Rakshit and
Others

RESPONDENT

Date of Decision: July 8, 1918

Final Decision: Dismissed

Judgement

Walmsley, J.

The facts of the case from which these appeals arise are as follows : Two brothers, Kartik Rakshit and Gonesh Rakshit, borrowed Rs. 500 on mortgage from the wife of one Asakrit Chandra Choudhuri in Chaitra 1313 B. S. in order to pay off debts due to various creditors : they mortgaged all their property in this deed. In the following year Kartik died, leaving two daughters who were still minors, and are the Plaintiffs. In Sravan 1317 B. S. no part of the debt on the mortgage had been paid off and Gonesh entered into a fresh arrangement : he executed two kat kabalas in favour of the same lady, one for Rs. 100 and covering two bighais of land, and another for Rs. 400 in respect of seven bighas and a quarter and a kistibandi bond for the sum of Rs. 256. By the kat kabalas the principal of the original mortgage was satisfied, and the kistibandi bond was for the unpaid interest that had accrued. Under the terms of the kat kabalas the creditor was to remain in possession until the sums mentioned were paid to her, and from the usufruct she was to pay the rent due to the landlord, and to take the balance as interest. Under the kistibandi bond Gonesh was to pay Rs. 64 per annum from 1318 to 1321. In 1318 and 1319 Gonesh executed three conveyances, selling three bighas for Rs. 150 to the contesting Defendants in Suit No. 97 on Jaist 13th, 1318, nine bighas and a quarter for Rs. 600 to the contesting Defendants in Suit No. 69, and one kotta and a quarter for Rs. 119 to the contesting Defendants in Suit No. 98 on Chaitra 8th, 1319. With the purchase money he paid off the sums due under the kat kabalas and the kistibandi bond. His nieces were married in 1316 and 1317 and they have brought three suits through their husbands for a declaration that the conveyances executed by Gonesh did not affect their eight

annas interest, and for recovering possession of their share as successors in interest of the deceased Kartik.

2. The Courts below have agreed in dismissing the suits and the Plaintiffs have appealed.

3. In the first Court it was urged that the transactions were fraudulent, but that contention has been given up. The points that have been put forward in this Court are as follows :

(1) Gonesh did not purport to convey more than his own right, title and interest, and therefore the conveyances could not affect the Plaintiffs' interests.

(2) If it be held that the Plaintiffs were bound by the debt contracted by their father Kartik, and if Gonesh paid the whole, he might recover from the Plaintiffs their share in the amount paid to the creditor, but that is a very different thing from selling the Plaintiffs' share without authority.

(3) Even if Gonesh purported to act as guardian of his minor nieces, and in that capacity to sell their share, it must be shown that he did so under the stress of necessity, and it is not enough to show that the transactions were for the benefit of the minors.

4. On the first point the learned Subordinate Judge says, "if the documents are liberally Construed, it would appear clear that Gonesh sold the 16 annas interest of himself and his minor nieces" for paying off the ijmalis debts of himself and their father Kartik." All the conveyances speak of the joint debt which had to be paid off if the property was to be saved, and except in one of them there is no suggestion that Gonesh was trying to discharge the debt at the expense of his own share only. The exception is Ex. H, the conveyance to Harimani Dasi, in which the interest sold is "my share " in the homestead. It is conceded that this conveyance did not affect the minors, but here I refer to it only as showing that the other conveyances were framed differently. I think the view taken by the lower Appellate Court is correct.

5. The second point need not be discussed. Gonesh might have followed another course, but that, will not matter if the Courts below are right in holding that he was acting under the force of necessity.

6. The third point is the one on which most stress was laid. It was found by the first Court, and it is not disputed now that the Plaintiffs were living with Gonesh when the conveyances were executed, and it is conceded that he was managing the property. The Plaintiffs' husbands were their natural guardians but there is no reason to suppose that they had ever asserted any claim to the management of the property. It seems to me clear the Gonesh was de facto guardian of the minors' property, and it must have been as such that he purported to convey their interest by the kabalas. The question then becomes whether under the circumstances he was legally entitled to make the sales. It appears from the record that the original

mortgage covered six kottas of lakhiraj, bastu with the buildings, four kottas of rent-paying bastu, and over twenty-four bighas of jamai land. In four years; interest had reached the sum of Rs. 256 and not an anna had been paid. If Gonesh had allowed the mortgage to run on, in a few years the whole of the, family property would have been swallowed up. His first step, the kat kabalas and the kistibandi bond, was obviously a wise one. After that there was no urgency about the land transferred under the kat kabalas, but no payment had been made under the kistibandi bond. It is urged that this bond made no provision for the whole sum becoming payable on one default : the wording is rather ambiguous, but I think that stipulation is in the bond, and in any case there was a provision for compound interest at the rate of one rupee eight annas per centum per mensem. Under the bond the ancestral property and dwelling-house were given as security. Looking at these facts it seems to me that the position of Gonesh was little less than desperate, and that the course he took was that of a prudent administrator. It is said however that though the sales may have been beneficial to the minors, they were not corn-lulled by necessity, and therefore the Plaintiffs are not bound by them. This sharp distinction between the effect of benefit and the effect of necessity is not warranted by the authorities. In *Hunooman Persaud Pandaij v. Munraj Koonwar* 6 M. I. A. 873 423 (1856) their Lordships of the Privy Council say "It (i.e., the power of a manager for an infant heir to charge an estate not his own) can only be exercised rightly in a case of need or for the benefit of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded." Mr. Mayne in his book speaks of the minor being bound " if under the circumstances the step taken was necessary, proper or prudent." Reference may also be made to Sir Ernest Trevelyan's remarks on p. 154 of his book " The Law Relating to Minors (4th edition) and to the decision of a Bench of this Court in *Krishna Chandra v. Raton Ram* (2)f Applying the principles laid down by these authorities I think the question can be determined in the present instance by asking what would have been the probable result if Gonesh had not taken the steps which he did take. In my opinion the answer must be that the whole property would have been endangered, at any rate that bigger sacrifices would have become inevitable. That being so. I think the Courts below we're right in holding that the sales were binding on the minors.

7. With regard to the sale to Harimani Dasi, the learned Munsif points out that the Plaintiffs have $23/4$ out of the 4 kottas, so they are not entitled to ask for any part of the $11/4$ kottas. This is correct. The appeals are dismissed with costs.

Panton, J.

I agree.