
(1870) 05 CAL CK 0009

Calcutta High Court

Case No: Special Appeal No. 2738 of 1869

Sridhar Deo Narayan
Sing

APPELLANT

Vs

Lalit Panday

RESPONDENT

Date of Decision: May 18, 1870

Judgement

Loch, J.

The first ground taken in special appeal related to the parties being legal heirs of the deceased, Tulsi Narayan. As, however, this point was not urged in the lower Appellate Court, and is a question of fact, we cannot allow it to be urged now. Secondly, that as the Courts have found that there was a legal necessity, the deed should have been held good in its entirety; and, thirdly, that the mortgagee having enquired and used due precaution to ascertain the existence of the necessity, he cannot be prejudiced by the manner in which the money was spent. The pleader for the special appellant has endeavored to show us that, whether the transaction be one simply creating a lien, or whether it be one absolutely transferring the proprietary right to another, the law in either case is the same. We think, however, that there is a great difference between the two cases. The decisions quoted to us by the pleader for the appellant all relate to cases of sale, and are, therefore, not applicable to the case before us. Where it is found necessary to create a mortgage, it is clearly the duty of the party borrowing the money, if that party has but limited interest, to borrow only to the extent of that necessity. He has no right to create a lien upon the property larger than that which is needful to remove the pressing necessity: and the lender, when making enquiries, is bound, it appears to me, to ascertain what is the extent of that necessity before making the loan. It would be no good answer if a lender were to say "it was proved to me that there was a necessity for rupees 500, and therefore I have lent rupees 2,000." The lender can only be protected if he has ascertained the extent of the necessity and lends money up to that extent only¹.

2. With regard to the third objection taken, no doubt that was the point which should have been enquired into. But the special appellant did not put it in issue, and it appears to me that it is now too late to raise this objection, and ask us to send the case back for a re-trial

on this point. We think, therefore, that the special appeal should be dismissed with costs.

¹ On this point see *Rajaram Tewari v. Lachman Prasad*, 4 B.L.R., A.C., 118. Particularly the remarks of Peacock, C.J., pp. 125 et seqq.