

ORIGINAL CIVIL.

Before Panckridge J.

SAROJENDRA KUMAR DATTA

v.

BINAPANI DASÍ.*

1938

Feb. 3, 4.

Mortgage—Personal decree—Priority—Hindu law—Alienation by Hindu widow.

The plaintiff, who was the mortgagee of a certain property belonging jointly to three Hindu brothers A, B and C, filed his suit on the mortgage after the death of A and in due course obtained a decree. Pending this suit A's widow and heiress filed a partition suit against B and C and, with the leave of Court, mortgaged in favour of the second defendant her interest in the property mortgaged to the plaintiff as also in another joint property. The plaintiff's decree was not fully satisfied by the sale of the property mortgaged to him. Thereupon, he filed this suit for a declaration that he was entitled to satisfy his personal decree out of the widow's share in the other joint property in priority to the claim of the second defendant to it.

Held that the claim of the plaintiff under the personal decree had no priority over the mortgage of the second defendant.

Ram Dhun Dhur v. Mohesh Chunder Chowdhry (1) and *Bepin Krishna Ghose v. Byomkesh Deb* (2) relied on.

Jayanti Subbiah v. Alamelu Mangamma (3); *Chatterput Singh v. Maharaj Bahadur* (4) and *Sat Narain v. Sri Kishen Das* (5) distinguished.

ORIGINAL SUIT.

The facts of the case and arguments of counsel appear fully from the judgment.

Sudhish Roy for the plaintiff.

B. N. Ghose and *S. K. Basu* for the second defendant.

PANCKRIDGE J. This suit raises a question of some difficulty relating to a Hindu widow's power

*Original Suit No. 725 of 1935.

(1) (1882) I. L. R. 9 Cal. 406.

(3) (1902) I. L. R. 27 Mad. 45.

(2) (1924) I. L. R. 51 Cal. 1033.

(4) (1904) I. L. R. 32 Cal. 198;
L. R. 32 I. A. 1.

(5) (1936) I. L. R. 17 Lah. 644; L. R. 63 I. A. 384.

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to alienate the estate to which she has succeeded as her husband's heir. It is necessary to set out the facts of the case in some detail.

On April 28, 1922, the plaintiff advanced a sum of Rs. 1,600 to three persons named Kali Prasanna Datta, Keshub Chandra Datta and Kripa Nath Datta, who, as their father's heirs, were the joint owners of two properties, Nos. 76A and 73/3, Darmahata Street. The advance was secured by a mortgage of No. 73/3, Darmahata Street.

In August, 1928, Kripa Nath Datta died intestate and childless, his heir and legal representative being his widow, the first defendant.

On February 12, 1930, the plaintiff instituted a suit on his mortgage and obtained a preliminary decree on June 5, 1931. Meanwhile on April 28, 1930, the first defendant had instituted a partition suit against the other members of her husband's family, in which she asked for partition and other reliefs. Her brothers-in-law filed a written statement, in the course of which they alleged that the joint estate was liable to satisfy certain debts.

On March 19, 1931, the first defendant applied in the partition suit and obtained leave to raise a loan of Rs. 1,500 on the mortgage of her interest in the premises 76A and 73/3, Darmahata Street.

On April 15, 1932, a mortgage was executed in pursuance of the leave obtained by the first defendant, the mortgagee being the second defendant, Debendra Nath Ash. By the deed the first defendant as the beneficial owner conveys to the second defendant all her undivided share of and in the Darmahata Street properties, to hold the same unto and to the use of the second defendant absolutely in fee simple subject to the proviso for redemption thereafter contained.

On May 20, 1932, the plaintiff obtained a final decree in respect of his mortgage of No. 73/3 and, on March 31, 1933, he purchased the mortgaged

premises in execution thereof. A preliminary partition decree had meanwhile been made in the first defendant's suit. By that decree the first defendant was declared entitled to one equal third share in the properties in suit, and there were the usual directions for partition or sale.

On May 20, 1933, the second defendant filed a suit on his mortgage against the first defendant and obtained a preliminary mortgage decree in August, 1934.

On September 17, 1934, the present plaintiff made an application stating, as was the fact, that the price realised by the sale of No. 73/3 was insufficient to satisfy his claim under the final decree, and asking for a personal decree under O. XXXIV, r. 6 of the Civil Procedure Code against the mortgagors, and an order was made that the mortgagors should pay a sum of Rs. 676-8 with interest at the rate of 6 per cent. per annum from April 1, 1933, together with the costs of the mortgage suit and the costs of the application, the liability of the first defendant in this suit being limited to the estate of her deceased husband, Kripa Nath Datta.

In execution of this order the plaintiff has attached the share of the first defendant in 76/A, Darmahata Street. He has now filed this suit in which the principal relief asked is a declaration that he is entitled to satisfy his personal decree out of the first defendant's undivided share of 76A, Darmahata Street in priority to the claim of the second defendant under the mortgage of April 15, 1932.

It is agreed that the only issue which I have to decide is whether the claim of the plaintiff is subject to the mortgage created by the first defendant. The plaintiff submits that the first defendant as the widow and heiress of Kripa Nath only succeeded to his estate subject to payment of the debts incurred by Kripa Nath during his life time, and that the rights of the second defendant as mortgagee are subject to the payment of those debts.

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The decision on which the plaintiff places most reliance is *Jayanti Subbiah v. Alamelu Mangamma* (1). In that case the appellant had obtained a decree against the widow and legal representative of the maker of a promissory note in his favour. He attached and purchased in execution a house belonging to the deceased maker of the promissory note in which the defendant was living at the time of the purchase. The claim was resisted by the widow on the ground that she had a right of residence during her life time, and that she could not therefore be ejected from the residential portion of the house. The widow's contention was rejected by the Court. At p. 50 of the report the following observations are to be found :—

A debt contracted by the husband himself as in the present case is necessarily binding upon the widow and on his death without male issue his estate devolves upon her by right of inheritance, in the absence of any individual kinsman of his. It is a mistake, under such circumstances, to regard her as having a right of maintenance (which includes right of residence) against her husband's estate. She takes it as heir and must administer it as such. It is only the residue that is left after discharging her husband's debts that will belong to her. During her husband's lifetime she had, no doubt, a right of maintenance against him, but that was only a matter of personal obligation on the part of the husband, quite independent of the possession of any property and it did not form a charge upon his property.

The circumstances of that case were quite different from those of the case with which I am dealing. The widow there was still in possession of the property, and it was not disputed that it was liable to satisfy the debts created by the husband, but what was urged was that the actual property attached, namely, a residential house, was still subject to the right of residence which the widow had enjoyed during the life time of her husband.

The submission on behalf of the plaintiff is that an heir must first administer the estate in the sense of paying the debt of his predecessor before he can dispose of any portion of it, and that if he disposes of the estate before the debts are satisfied, the transferee takes it subject to the liability to discharge

those debts. For this proposition the plaintiff relies on *Chatterput Singh v. Maharaj Bahadur* (1) where Lord Davey in delivering the judgment of the Judicial Committee observes :—

But their Lordships agree with the broader proposition stated by Mr. Phillips. When the estate of a deceased person is under administration by the Court or out of Court, a purchaser from a residuary legatee or heir buys subject to any disposition which has been or may be made of the deceased's estate in due course of administration. In fact the right of the residuary legatee or heir is only to share in the ultimate residue which may remain for final distribution after all the liabilities of the estate, including the expenses of administration, have been satisfied.

According to the plaintiff the estate of Kripa Nath in this case was under administration out of Court within the meaning of Lord Davey's observations.

In my opinion what Lord Davey had in mind was the distinction between cases where an estate is being administered by the Court as the result of an administration decree and cases where it is being administered not by the Court, but by an executor or administrator obtaining his title from a grant of probate or letters of administration. I think that it is clear that this was the view taken of the meaning of these words by Sanderson C. J. in a case to which I shall refer later.

Various decisions have been cited where in cases of partition it has been held that the proper direction in a partition decree is that before partition the estate should first satisfy the debts of the father provided they have not been incurred for illegal or immoral purposes. An instance of this line of cases is *Sat Narain v. Sri Kishen Das* (2).

I do not myself think that the partition decree in the suit brought by the first defendant or the proceedings in that suit generally have any bearing on the question which I am called upon to decide. In any event there is no question here of the estate being called upon to satisfy ancestral debts. The only question is whether the conveyance by the first defendant is subject to any right of the plaintiff to execute

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(1) (1904) I. L. R. 32 Cal. 198 (217-18); (2) (1936) I. L. R. 17 Lah. 644;
L. R. 32 I. A. 1 (16).

L. R. 63 I. A. 384.

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his personal decree against the estate of the first defendant's deceased husband out of the property conveyed.

Mr. Ghose has directed my attention to two decisions of this Court. The first is *Ram Dhun Dhur v. Mohesh Chunder Chowdhry* (1) where it was held that a mortgage created by an heir and devisee after the testator's death was valid as against one of the testator's creditors inasmuch as the decree in the creditors' suit had not created a charge on the testator's property. That decision appears to me to be adverse to the plaintiff's contention that he is entitled to follow the property in the hands of the alienee for the purpose of satisfying the husband's debt. The decision to which I referred a short while ago and to which Sanderson C. J. was a party is *Bepin Krishna Ghose v. Byomkesh Deb* (2). It is true that that case was directly concerned with the doctrine of *lis pendens* as formulated in s. 52 of the Transfer of Property Act. It is also true that it appears that the creditors' claim was never argued on the basis of Hindu law before the appellate Court. Apparently before the Court of first instance certain submissions as to Hindu law were made to the learned Judge who rejected them. These submissions were not, however, pressed upon appeal. It is noticeable, however, that Sanderson C. J. refers to the passage in *Chatterput Singh v. Maharaj Bahadur* (3) set out above, and I think it is clear he could not have decided the case in the way he did, if he had thought that the words "administration out of "Court" meant what the plaintiff now submits they mean. In that case the heirs had executed several mortgages of properties belonging to the estate of the deceased father. A creditor brought a suit which was referred to arbitration. The award gave the creditor liberty to apply to the Court for the appointment of a receiver of the estate and for administration thereof by and under the direction of the Court. The

(1) (1882) I. L. R. 9 Cal. 406.

(2) (1924) I. L. R. 51 Cal. 1033.

(3) (1904) I. L. R. 32 Cal. 198 ; L. R. 32 I. A. 1.

award was made a decree of Court on April 22, 1919, and on July 2, 1920, the creditor obtained a preliminary administration order in terms of the award. It was held that the doctrine of *lis pendens* applied to mortgages created subsequently to July 2, 1920, but not to any prior mortgages. If the plaintiff's contention is correct the estate of the deceased would have been under administration out of Court from the day of his death, and therefore all the mortgages would have been subject to the rights of the creditors whether created before or after the administration order. The essential facts in *Bepin Krishna Ghose v. Byomkesh Deb* (*supra*) appear to me to be the same as the facts with which I am dealing. It is true that in the case of a Hindu widow it is open to the reversioners to challenge the legality of an alienation made by her. But this is a right which is limited to them and is not one of which a third person can take advantage.

In my opinion, the claim of the plaintiff under the order of December 17, 1934, has no priority over the mortgage to the second defendant of April 15, 1932, in the sense that the plaintiff is entitled to execute his decree against the property covered by that mortgage. Having come to this conclusion on the only point at issue in the case, I must dismiss it with costs.

The second defendant concedes that the plaintiff's title as purchaser of No. 73/3 under his mortgage decree is valid so far as he is concerned.

Suit dismissed.

Attorney for plaintiff: *B. K. Dutt.*

Attorney for defendant: *R. K. Bose.*

S. M.

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