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September, 9

Before Mr. Justice Niamat-ullah and Mr. Justice Allsop

KABUL CHAND (DEFENDANT) *v.* BADRI DAS (PLAINTIFF)*

Transfer of Property Act (IV of 1882), sections 43, 100—Mortgaging property in anticipation of acquiring it by pre-emption —Mortgagee's knowledge—Subsequent acquisition—Whether mortgage attaches—Equitable doctrine of "feeding the estoppel"—Charge—Notice—Registration—Practice and pleading—Specific plea as to want of necessity for high rate of interest.

A mortgage included an item of property which did not then belong to the mortgagor but which he was expecting to acquire by a suit for pre-emption; this was known to the mortgagee. Subsequently the property was so acquired:

Held, in accordance with previous decisions of this Court, that as the transferee was aware of all the circumstances and the state of the transferor's title it could not be said that there was any fraudulent or erroneous representation by the transferor, and section 43 of the Transfer of Property Act did not apply.

It was doubtful whether, apart from section 43 of the Transfer of Property Act, any general equitable doctrine of "feeding the estoppel", taken from English law, could be applied.

If the deed failed to create a mortgage, however, it certainly created a charge within the meaning of section 100 of the Transfer of Property Act, as by it the parties in substance agreed that this property, when it was acquired, would also be a security for the money advanced.

The fact that the deed in question was registered, along with other circumstances of the case, would affect subsequent mortgagees with notice of the charge created by the deed, for the purpose of the second paragraph of section 100 of the Transfer of Property Act.

If no specific plea of the want of necessity to borrow at a high rate of interest is raised in defence, apart from a plea of want of legal necessity for the loan itself, nor is the question mooted in the lower courts, it can not be raised in second appeal.

*Second Appeal No. 1505 of 1933, from a decree of S. W. Alam, Additional Civil Judge of Muzaffarnagar, dated the 14th of September, 1933, confirming a decree of Anand Behari Lal, Munsif of Kairana, dated the 7th of June, 1932.

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Mr. *B. Malik,* for the appellant.

Messrs. *Panna Lal, S. N. Gupta* and *Jagnandan Lal,* for the respondent.

NIAMAT-ULLAH and ALLSOP, JJ.:—These two appeals arise out of a suit for sale on foot of a mortgage deed, dated 2nd July, 1919, executed by Raja Ram, who is now represented by his sons, and by Lajja Ram, who is defendant No. 3. The sum secured by the deed was Rs.200, carrying interest at the rate of Rs.1-8-0 per cent. per mensem, compoundable every year. The plaintiff, in whose favour the deed was executed, brought the suit, which has given rise to these appeals, against the sons of one of the mortgagors and the other mortgagor (defendant 3), impleading also, among others, defendants 4 and 8, the appellants in the two appeals before us, who were described as subsequent mortgagees. The suit was contested by some of the defendants on the ground that the property mortgaged by Raja Ram and Lajja Ram belonged to a joint Hindu family consisting of the executants and other members of their family, and that there was no legal necessity for the loan evidenced by the mortgage deed in suit. Defendants 4 and 8, the appellants in this Court, contested it on the ground that a portion of the mortgaged property did not belong to the mortgagors on the date of the mortgage and that *qua* such portion the mortgage deed was invalid. Subsequently it became common ground that the property hypothecated under the deed in suit included a portion of a "mahal" in the village comprising the share of the mortgagors and that of another co-sharer, who had executed a sale deed in favour of a stranger, giving rise to a right of pre-emption exercisable by the mortgagors. It was also common ground that the mortgagors were contemplating a suit for pre-emption in respect of the share transferred to the stranger when they executed the mortgage deed in question. Their right to pre-empt was so clear that they had no doubt that they would acquire the property sold to the stranger, and in anticipation of the

exercise of their pre-emptive right they included, as part of the mortgaged property, the share which had been sold to the stranger and which they intended to acquire by exercising their right of pre-emption. It is conceded that this share was subsequently acquired by the mortgagors by pre-emption. To the defence put forward by defendants Nos. 4 and 8 the plaintiff replied that, though part of the mortgaged property did not belong to the mortgagors on the date of the mortgage, yet, as it was subsequently acquired by them, the mortgage as regards such share became effective when the mortgagors acquired it. The plaintiff relied on section 43 of the Transfer of Property Act.

Both the lower courts held that the entire consideration of Rs.200, advanced by the plaintiff, was warranted by legal necessity, the same having been borrowed by the mortgagors for payment of Government revenue and for the purchase of bullocks. Both the lower courts likewise found that the mortgage deed enured for the benefit of the plaintiff in respect of the share which did not belong to the mortgagors on the date of the mortgage but was subsequently acquired under a decree for pre-emption. On these findings the plaintiff's suit for recovery of principal and interest due under the mortgage deed in suit by sale of the mortgaged property was decreed. Defendants 4 and 8 filed separate appeals in the lower appellate court. They have done the same in this Court.

It was argued by learned counsel for the appellants that, in the absence of a finding by the courts below, it should be held that no legal necessity for contracting a loan at a high rate of interest has been made out. It is contended that the validity of the mortgage having been challenged, the plaintiff ought to have established not only that there was legal necessity for the loan itself, but also for raising it at the high rate of Rs.1-8-0 per cent. per mensem compoundable every year. No specific plea in reference to the rate of interest was raised in the written

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statement filed by any of the defendants. The judgments of the lower courts do not indicate that the questions which are argued in second appeal were mooted in those courts. The question of legal necessity was raised by members of the family of the mortgagors. Strictly speaking, it is not open to defendants 4 and 8, the appellants in this Court, who are subsequent transferees, to raise any question of this kind. In any case, we think that they are not entitled to raise it in second appeal. If the plea had been taken at the proper time, the plaintiff might have established that the mortgagors, whose need of money was urgent, could not obtain a loan at a more favourable rate of interest. Accordingly we overrule the appellants' contention on this part of the case.

The most important question argued in the case is whether the mortgage deed in suit can be considered to have validly conveyed to the plaintiff an interest in the property which did not belong to the mortgagors when they executed the deed in suit and which they subsequently acquired in a pre-emption case. We do not consider it necessary to enter upon a detailed examination of the arguments for and against the view that section 43 is applicable to the circumstances of this case. This Court has held in several cases that if the transferee was aware of all the circumstances and the state of the transferor's title, so that it could not be said that the mortgagor fraudulently or erroneously represented to the transferee that the property transferred by the deed belonged to him and that he was authorised to transfer it, section 43 does not apply. See, for instance, *Mulraj* v. *Indar Singh* (1). If the question were *res integra,* we would have considered it for ourselves as in our opinion much can be said on either side. The lower appellate court held, relying on the rulings of this Court, that section 43 does not help the plaintiff, but it went on to hold, on the authority of *Ram Lal* v. *Shiama Lal* (2) that on equitable grounds the plaintiff is entitled to treat the

(1) (1925) I.L.R. 48 All. 150. (2) [1931] A.L.J. 73.

property subsequently acquired as security for the money advanced by him. The case undoubtedly supports the view taken by the lower appellate court. We are, however, unable to find any statutory law on which the view can be based. The learned Judges applied the doctrine of "the grant feeding the estoppel". How far that doctrine is applicable, apart from section 43 of the Transfer of Property Act, is a question not free from difficulty. The learned Judges apparently think that section 43 is not exhaustive on the subject and that it is open to the courts in this country to draw on the English law to decide cases on equitable considerations, even though section 43 does not cover the case.

Learned counsel for the respondents has referred us to another case of this Court, *Gaya Din* v. *Kashi Gir* (1), which is very similar to the case before us. In that case the plaintiff in a pre-emption suit, in order to procure funds for the prosecution of his suit, executed a mortgage comprising certain property of which he was the owner and also the property which was the subject-matter of the suit for pre-emption. The suit for pre-emption was successful. It was held that the mortgage took effect as regards the property of the subject of the pre-emption suit from the time when the plaintiff mortgagor obtained possession by virtue of his decree in the suit. The learned Judges based their view on certain English cases. They quoted from *Collyer* v. *Isaacs* (2) the following passage: "A man cannot in equity, any more than at law, assign what has no existence. A man can contract to assign property which is to come into existence in the future, and when it has come into existence, equity, treating as done that which ought to be done, fastens upon that property, and the contract to assign thus becomes a complete assignment." It is possible that the learned Judges thought that the rule accepted by them is to be applied in this country, being covered by section 43 of the Transfer of Property Act. That section is not,

(1) (1906) I.L.R. 29 All. 163. (2) (1881) 19 Ch.D. 342.

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however, in terms referred to by the learned Judges. At another place in their judgment (page 164) they observe: "It appears to us that when the mortgagor acquired by pre-emption and got possession of the pre-empted property, equity, treating that as done which ought to be done, gave the mortgagee a charge by way of mortgage upon the pre-empted share." This clearly indicates that the learned Judges gave effect to the transaction as creating a charge. We think that a case like this case can be easily decided on that footing. Section 100 of the Transfer of Property Act provides: "Where immovable property of one person is, by act of parties or by operation of law, made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge."

If section 43 is not applicable, the deed in suit did not create a mortgage as regards the property which the mortgagors did not own but subsequently acquired under the pre-emption decree. We have referred to the terms of the deed and find that in clear terms it makes the property which was subsequently acquired by the mortgagors, though the deed treats it as then belonging to the mortgagors, as security for the money advanced thereunder. The lower court has found that the mortgagee was aware of the fact that the share did not belong to the mortgagor at the time when the mortgage deed was executed. It has also found that both the mortgagors and the mortgagee had every reason to expect that not long afterwards that part of the mortgaged property would also belong to the mortgagors. Taking this fact with the contents of the mortgage deed, it is clear to us that in substance the parties had agreed that the money then advanced would be charged on the property then belonging to the mortgagors and that another share mentioned in the deed, for which a suit for pre-emption

was in contemplation, would also be a security for payment of the money when it was acquired. The transaction *qua* this property did not amount to a mortgage but created a charge on the share to be subsequently acquired by the party to whom the debt was advanced. A floating charge on the assets of a company for the time being is a familiar instance of a charge being created on property not in existence at the time when the loan is advanced but which is acquired subsequently. We think that the share which the mortgagors subsequently pre-empted became a security for the money borrowed by them previously under the deed of 2nd July, 1919. Accordingly we hold that the decree of the lower court in this respect can be supported on the ground mentioned above, if the charge is otherwise valid.

Learned counsel for the appellants contended that unless the plaintiff proves that defendants 4 and 8 had notice of the charge, he cannot succeed in enforcing it against them. The reply to this contention, given by the lower court, is that the mortgage deed in suit was registered and defendants 4 and 8 should have searched the registration office to find out if any encumbrances had been created before they advanced the money under their own deeds. Defendant No. 4 entered the witness-box and stated that he inspected the registers for four years, i.e. for a period after the 30th April, 1920, when the decree for pre-emption was passed in favour of the mortgagors. Defendant No. 8 did not give his own evidence. A person is said to have notice of a fact when he either actually knows it or, but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it. We think that in all the circumstances of the case, defendants 4 and 8 ought to have searched the registers for, at least, 12 years; and if they had done so, they could not have failed to discover that the mortgagors had, by a deed, dated the 2nd July, 1919, created a charge as regards the share which came into their possession by pre-emption on the 30th April,

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1920—a fact which, it is not disputed, was known to them. Accordingly we hold that the appellants are not protected by the second paragraph of section 100 of the Transfer of Property Act.

A subsidiary question has been argued on behalf of the appellants to the effect that they are entitled to redeem the mortgaged property piecemeal. It is said that part of the mortgaged property had been hypothecated by the mortgagors to the plaintiff under a deed executed in 1915. In enforcement of that mortgage that part of the property was sold and purchased by some members of the plaintiff's family. It is contended that in these circumstances the integrity of the mortgage now in suit has been broken and that it is open to the defendants to redeem only part of the mortgaged property. The lower appellate court has repelled this contention and, we think, rightly. To the suit brought for the enforcement of the mortgage of 1915 all those who are parties to this case were also parties. They failed to redeem the mortgage of 1915, with the result that part of the property was sold for satisfaction of the prior mortgage. The property which is left for the satisfaction of the mortgage in suit is the only property on which it can operate. The integrity of the mortgage in question in the present case has in no sense been broken.

The result of our findings is that these appeals fail and are dismissed with costs.