

1905
APRIL 26.
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[746] APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Mitra.

MON MOHINI GHOSE v. PARVATI NATH GHOSE.*

[26th April, 1905.]

Practice—Parties—Mortgage suit—Transfer of Property Act (IV of 1882), s. 85.

Part owners of a mortgaged property, who did not execute the Indenture of mortgage and did not receive the money and were not interested in the equity of redemption are not necessary parties to a suit to enforce the mortgage.

[Ref. 33 Cal. 425=3 C. L. J. 205; 12 C. W. N. 94; 31 All. 11=1908 A. W. N. 263=5 A. L. J. 397=5 M. L. T. 47.]

SECOND APPEAL by the plaintiff Mon Mohini Ghose.

Mon Mohini Ghose, widow of Kailas Chandra Ghose, instituted a suit against defendants Nos. 1 to 10 to enforce a mortgage bond executed by the defendants Nos. 1, 3, 4, 5, 6, 10, and one Dwarka Nath Ghose, deceased, father of defendant No. 8 on the allegation that the defendants Nos. 1, 2 and 9 were members of a joint Hindu family, of which the defendant No. 1 was the *karta* and manager and that the defendants Nos. 6 and 7 were also members of a joint Hindu family, of which the defendant No. 6 was the *karta* and manager; that the executants of the mortgage deed took from the plaintiff a loan of Rs. 2,000 to pay off certain *ijmali* debts of the defendants Nos. 1 to 10, and in consideration thereof they executed the mortgage deed by which they mortgaged properties belonging jointly to themselves and the defendants Nos. 2, 7 and 9.

The defendants pleaded *inter alia* that the mortgaged property did not belong solely to them, but jointly to themselves and Hemanta Kumari, Bidya Sundari and the sons of Kailas Chandra Ghose, who were all representatives of the same person and were living in the same house, and were joint in property, and that, therefore, the said Hemanta Kumari, Bidya Sundari and the sons of Kailas Chandra were necessary parties to the suit.

[747] The Subordinate Judge, who tried the suit, found that the aforesaid Hemanta Kumari, Bidya Sundari and the sons of Kailas Chandra were part owners of the mortgaged property, but he also found that the money, which was the consideration for the mortgage, was taken by the mortgagor "for the purpose of paying *ijmali* debts of the defendants and not of Kailas Chandra and other co-sharers," and that the latter had not received the money. He held that the aforesaid Hemanta Kumari, Bidya Sundari and the sons of Kailas Chandra not being the executants of the bond and not having received the money, were not necessary parties to the suit. He decided all the remaining issues in the suit in favour of the plaintiff and decreed the suit.

On appeal by the defendants the District Judge dismissed the suit holding that Hemanta Kumari, Bidya Sundari and the sons of Kailas being admittedly interested in the property mortgaged were exactly on the same footing as defendants Nos. 2, 7 and 9, and were necessary parties to the suit under section 85 of the Transfer of Property Act. He did not try the other questions raised in the suit.

* Appeal from Appellate Decree No. 1434 of 1903 against the decree of J. H. Temple, District Judge of Backergunge, dated the 7th of May 1903, reversing the decree of Prasanna Kumar Bose, Subordinate of Backergunge, dated the 18th of December 1902.

The plaintiff appealed to the High Court.

Babu *Jogesh Chandra Roy* for the appellant. Only those persons, who are interested in the equity of redemption are necessary parties to a suit for sale; a party, who neither executed the mortgage deed nor received the money, cannot be called upon to redeem the mortgage. The mortgagors represented that they were the owners of the entire property and mortgaged it to me; they may not be entitled to the property, but the other persons claiming the property are not necessary parties to my suit to enforce the mortgage. It would be complicating the issues in a suit for sale to bring in persons on the record, who claim adversely to the mortgtgor. White and Tudor's Leading Cases, vol. II, p. 43. *Hare Krishna Bhowmick v. Robert Watson & Co.* (1), was decided on the ground that the plaintiff had brought on the record a party, who challenged the mortgagor's title and had accepted the challenge. The defendants Nos. 2, 7 and 9 were made parties for persons given in the plaint; the mortgage was executed on their behalf by the *kartas* [748] of the respective families, of which they were members. In the decree in a suit for sale the defendants are directed to pay off the mortgage; if I had made these other persons parties they would have come and said that, not being parties to the mortgage and not having received the money, they were not necessary parties, Ghose's Law of Mortgage p. 685.

Babu *Dwarka Nath Chuckerbutty* (Babu *Baicuntha Nath Das* and Babu *Sarat Chandra Ghose* with him) for the respondents. The difficulty has been created by the plaintiff herself. The case of the defendants is that the plaintiff's husband and the other defendants were joint owners of the property, which had become involved and the plaintiff's husband advanced the money, paid off the debts and took a mortgage from some of the co-sharers in the name of his wife; she now sues on the mortgage leaving out her own sons, who also are interested in the property. She has made persons other than the executants parties, but she has made only some of them parties, omitting the others. With regard to the defendants, who are not executants of the mortgage, the mortgage deed does not show that any of the executants executed it on their behalf as *karta*.

MACLEAN, C. J. I do not think it was necessary in this suit, which was one to enforce a mortgage, to make the three persons, Hemanta Kumari, Bidya Sundari and the sons of the plaintiff, parties. They were not interested in the equity of redemption. As they did not execute the deed and were not mortgagors, and are not interested in the equity of redemption of the mortgaged property, I do not think they were necessary parties to the suit. The appeal will be allowed and the case will go back to be tried on the merits. The appellant will have her costs of this appeal and the Court-fee paid by her on the memorandum of appeal will be returned to her.

MITRA, J. I concur.

Appeal allowed, case remanded.

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