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Court : Kolkata

Decided On : Aug-03-1908

Reported in : 3Ind.Cas.859

Judge : Fletcher, J.

Appellant : Jogendra Chunder Dutt and anr.

Respondent : Apurna Dassi and ors.

Judgement :

Fletcher, J.

1. This a suit on two mortgages. The case is not altogether free from difficulty.
2. The facts are as follows :-The plaintiff claims as the transferee of two Bengali deeds of mortgage. The first deed is dated the 21st July 1896, by which two persons, Kamala Churn Dutt and Abinash Chanrda Dutt, mortgaged, for the sum of Rs. 1,500 with interest at 4 per cent., their undivided share in the house and premises No. 1, Zeriff's Lane, in favour of one Noreridra Nath Bose. The second mortgage-deed is dated the 6th February 1897 whereby Ambica Churn Dutt, who was a brother of the mortgagors in the first mortgage, mortgaged in favour of Norendra Nath Bose his undivided share in. the same house, to secure the repayment of Rs. 500 with interest at 4 per cent.

3. Now, the real contest before, me is as to who is entitled to those sums of Rs. 1,500 and Rs. 500; did they belong to Norendra Nath Bose, or was he merely a benamidar for his father and uncle?

4. It appears on the evidence that the father and uncle of Norendra had been carrying on a business in money-lending for many years and they were joint in estate. It appears from the books of the firm that the name of Norendra had been used for completing, certain money-lending transactions, and whenever money in the firm was not sufficient to carry on the business, money was brought in and put into this joint family business in, the benami name of Norendra. It also appears that on the death of Norendra, which took place before his father's, the various sums of money standing to the credit of Norendra in the accounts, were transferred into the name of Kali Nath, the next brother of Norendra.

5. Taking into consideration that these transactions commenced from the time when Norendra was 6 years old down to the time of his death, there is little doubt that Norendra was a benamidar for his father and uncle.

6. Norendra died in October 1897 leaving him surviving his widow, Sreemutty Suhashmi-bala, who is a co-plaintiff with Jogendra. She gave birth to a posthumous son. That son has since died and now the widow of Norendra is entitled to any estate that Norendra has left, for a Hindu widow's interest. Norendra's father subsequently, died leaving a Will whereby he appointed his widow an executrix thereof. That Will was duly proved by the said widow and the present defendants are entitled to the equity of redemption in the mortgaged premises.

7. The plaintiff, Jogendra Chunder Dutt, claims the two mortgages which were originally executed in favour of Norendra, by virtue of two deeds of transfer which were executed by the widow of Norendra and the executrix of Norendra's father and by Preo Nath Bose, Norendra's uncle.

8. Now, the points in issue are, first, as to who was entitled to the mortgage-money. On that, I am of opinion that the money belonged to Norendra's father and uncle. The second point is as to whether the widow of Norendra, who is a party to

the suit and added as a co-plaintiff, for greater safety sufficiently represents the estate of her deceased husband. In my opinion, she does. There is no other person short of obtaining letters of administration to the estate of Norendra who can be said to represent the estate of Norendra, and it is not obligatory on a Hindu heir to obtain letters of administration.

9. The remaining point is as to whether the deeds of transfer were validly executed. Now, the widow and executrix of Norendra's father executed in favour of her son a power-of-attorney which contained among other powers a power to sell and convert into money the goods, effects and things belonging to me.' It is said on behalf of the plaintiffs that this authorised the attorney to sell or convert into money this mortgage debt.

10. Now, apart from the question as to whether or not an executor is entitled to exercise a power of sale conferred on him by statute by his attorney, within the words authorising the attorney to sell and convert into money the goods, effects and things belonging to me,' the case, *In re Dawson and Jenkin's Contract* (1904) 2 Ch. 219, seems to me to cover this case. The only point in this case is, is a mortgage a thing? In my opinion, it is. It is a thing in action. There is nothing in the deed which suggests that the thing is to be limited to a chose in possession. In fact, the power to the attorney to convert the money into a thing, shows it includes a chose in action and a chose in possession.

11. But, the case does not end there. The donor of the power is an executrix, and it is argued that an executrix is not competent to exercise power of sale given by statute by the attorney. With regard to the note in *Farwell on Powers* (2nd Edition) at p. 4.46, that does not cover the case. That is only applicable to the case of an executor appointing an attorney to get in property vested in him as such. It does not apply to the case of an executor selling under a power conferred by statute the property which is vested in him by the Will. There is no distinction between a power given by statute and a power conferred by Will.

12. Accordingly, I hold that the power-of-attorney, in so far as it delegates to the attorney the power to exercise discretion vested in the executrix, is void. But, the case does not end there. In India, there are no requisites as to how agency is to

be delegated, and the evidence in this case is that the principal,' that is the executrix was actually present when the deeds of transfer were executed and that the attorney consulted her in all the dealings relating to the transfer and that she approved of the same and that the agent executed the transfers under her approval. The transfers themselves do not express whether they were executed under power given by writing or under verbal instructions.

13. In these circumstances, the case clearly falls within the legal maxim *ut res majis valeat quam pereat*; and it must be taken that the attorney executed the transfers under the express verbal authority given to him by the executrix. I, therefore, hold that the deeds of transfer were duly executed.

14. I, therefore, make the usual mortgage decree in favour of the plaintiff, Jogendra, with a declaration that Jogendra is entitled to receive the money secured by the two mortgages and the defendants must pay the plaintiff's costs of suit on scale No. 2.

15. Mr. Pugh.-I suppose the plaintiff, Jogendra, will execute the release on getting the money.

16. The Court.-Yes.