**Profulla Chandra Sinha and ors. Vs. Bisseswar Sinha and ors.**

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**SooperKanoon Citation** : sooperkanoon.com/867628

**Court** : Kolkata

**Decided On :** Apr-12-1938

**Reported in** : AIR1938Cal778

**Appellant** : Profulla Chandra Sinha and ors.

**Respondent** : Bisseswar Sinha and ors.

**Judgement** :

**Lort-WIlliams, J.**

1. This is a claim on behalf of Profulla Chandra Sinha and Madhusudan Singh, two minor members of a Mitakshara joint Hindu family for a declaration that a mortgage of the joint estate by the other members of the family, including the fathers of the plaintiffs is not binding on them, and for other reliefs. The following pedigree will help to elucidate the facts:

Abhoy Charan Sinha|------------------------------------------------------------| | |Purna Chandra (d. 11-3-01) Raj Chandra Haris Chandra=1st wife, 2nd wife: (d. 18-11-05)=Sm. Maguni (d. 8-7-79)=Sm. Sulochona| | | |----------- | --------------- Probodh=Sm. Mayabati| | | | |Chundey Bisseswar | Radhamohan Khetter Mohan Prafulla(d. 17-11-04) | |------------------------------------| | |Brojeswar Sidheswar Jogeswar=Sm. Sailabala(d. 19-6-19) |Madhusudan

2. The defendants, other than the mortgagee, Surendra Nath Mitra, have not filed any written statements, or contested the suit or appeared at the hearing. The estate consists of the family dwelling house in Calcutta and property at Puri. The following facts are to be gathered from the documents and statements made therein by the Singh defendants. In 1910 Bisseswar, Brojeswar, Sidheswar, Radha Mohan and Probodh in their personal capacities and Bisseswar as head and Manager of the joint family, which included also Jogeswar and Khetra Mohan, who were then minors, mortgaged the family dwelling house in favour of one N. C. Ball to secure a loan of Rs. 2000 borrowed in order to 'liquidate certain joint family debts and to preserve certain joint family properties at Puri'. At this time, the plaintiffs were not born. In February 1915, the adult members of the family mortgaged the same property in favour of Sreemutty Charusila Dassi to secure a loan of Rs. 2500 borrowed in order to pay off a balance of Rs. 1086 then owing to Dull who was pressing for payment, and to meet certain joint family expenses. In June 1915, they mortgaged the same property in favour of P.C. Mitter to secure a loan of Rs. 3000 borrowed in order to pay off the last mentioned loan, which they were unable otherwise to pay In 1918, Bisseswar, Brojeswar, Sidheswar, Jogeswar, Radhamohan, Khetra Mohan and Probodh mortgaged the same property in favour of N. C. Kundu to secure a loan of Rs. 3500 borrowed in order to pay off Mitter's loan, who was pressing for payment. In 1919 Brojeswar died. In 1921, Sidheswar, Jogeswar, Radhamohan, Khetra Mohan and Probodh gave a power of attorney to Bisseswar to act for them in the management of all the family property, including power to sell or mortgage it.

3. In 1924, Bisseswar, Sidheswar, Jogeswar, Radha Mohan, Khetra Mohan and Probodh, in their personal capacities, and Bisseswar, as the Karta or managing member of the joint family consisting of the above adult members and Profulla, the minor son of Probodh, mortgaged the family dwelling house in favour of K.C. Shah, E.L. Shah and Sreemutty Priyabala Dassi to secure a loan of Rs. 10,000 borrowed in order to repay the sum of Rs. 5345 then owing in respect of Mitter's mortgage and to pay off 'joint family debts and necessary expenses' including a sum of Rs. 5500 being the balance of Rs. 8000 spent in 1923 upon the repairs of the family dwelling house, which had fallen into a 'very bad state of repairs' and of which thorough repair had 'became absolutely necessary for the preservation of

the said property'. In October 1926, Bisseswar, Sidheswar, Jogeswar, Radha Mohan and Khetra Mohan mortgaged their 2/3rds share in the family dwelling house, free from encumbrances save and except the Shah mortgage in favour of P.C. Mazumdar to secure a loan of Rs. 1000. In November 1926, Sidheswar and Bisseswar executed a promissory note in favour of J. N. Das for Rs. 3200 being an amount due for jewellery and ornaments supplied to Sidheswar: subsequently Das instituted a suit and a decree was passed for Rs. 3278. Later there was an attachment, and the matter was settled upon terms inter alia, that Sidheswar and Bisseswar charged their 2/9th share in the family dwelling house in favour of Das to secure the debt, and a receiver was appointed. In December 1926 Bisseswar for self and as authorized agent for Sidheswar, Jogeswar, Probodh, Radha Mohan and Khetra Mohan mortgaged the family property at Puri in favour of the defendant S. N. Mitter, to secure a loan of Rs. 4000 borrowed in order to satisfy the debt due to Das 'and other petty debts'. In 1928, Bisseswar for self and as attorney of Sidheswar, Jogeswar, Radha Mohan, Khetra Mohan and Probodh executed a promissory note in favour of S. N. Mitter for Rs. 5000. On 4th September 1929, Bisseswar for self and as authorized agent of Sidheswar, Jogeswar, Probodh, Radha Mohan and Khetra Mohan, members of a joint Hindu Mitakshara family, mortgaged the whole family estate, both at Calcutta and at Puri, in favour of S. N. Mitter to secure a loan of Rs. 28,995 borrowed in order to liquidate the following debts and for household expenses:

Rs. 4972-0-0 owing to S. N. Mitter in respectof the loan of Rs. 4000.Rs. 5527-8-0 owing to S. N. Mitter in respectof the loan of Rs. 5000.Rs. 500-0-0 still owing to Mazumdar in res-pect of the loan of Rs. 1000.Rs. 14,878-11-9 still owing to Shah in respectof the loan of Rs. 10,000.Rs. 2630-14-2 still owing to Das in respect ofhis decree arising out of theloan of Rs. 3200.Rs. 485-14-1 for household expenses.----------Rs. 28,995-0-0

4. Part of the loan of Rs. 4000 was used to pay off part of the debt due to Das, and part of the loan of Rs. 5000 was used to pay off part of the debt due to Mazumdar. In 1934, S. N. Mitter instituted a suit on this mortgage against Bisseswar, Sidheswar, Jogeswar, Radha Mohan, Khetra Mohan, Probodh, Profulla, minor son of Probodh, and Madhusudan, minor son of Jogeswar. Probodh and Jogeswar

were appointed guardian ad litem respectively of Profulla and Madhusudan. Probodh died on 10th July 1935, and the cause title and pleadings were amended accordingly, and Bisseswar was appointed guardian ad litem of Profulla. In 1936 a decree for Rs. 45,000 in full settlement of the claimed costs was passed by consent of all parties and a receiver was appointed. In pursuance of this decree, all the property was sold by the receiver and bought by the defendant, S. N. Mitten, the Calcutta property for Rs. 24,000 and the Puri property for Rs. 6600.

5. The plaintiffs allege that at all material times Probodh was a lunatic. That the mortgage of 1929 was not made for any legal necessity or for any benefit of the estate and that as such it is void, inoperative and not binding on the plaintiffs. Further they allege that grossly inadequate prices were realized for the properties, which were worth not less than Rs. 35,000 and Rs. 15,000 respectively. That the decree and sales were fraudulent and collusive, and that the plaintiffs were not properly represented in the proceedings, nor were their interests safeguarded. That the defendants acted fraudulently and in concert and collusion with each other, and that Bisseswar and Jogeswar were guilty of culpable negligence towards the plaintiffs. No particulars have been given of these allegations of fraud and negligence. The following issues were raised and settled:

1. Is this suit maintainable having regard to,

(a) Vague and general allegations of fraud, collusion and negligence without any particulars whatever in the plaint.

(b) The plaint not disclosing any cause of action,

(c) No leave having been obtained under Order 2, Rule 4 to join the several causes of action.

2 (a). Were the preliminary decree, or the final decree or the sales fraudulent or collusive as alleged in paras. 19 (a) and 11 of the plaint?

(b) Were the defendants Bisseswar Singh or Jogeswar Singh guilty of negligence as alleged in para. 11 of the plaint?

(c) Were the plaintiffs not properly represented or their interests not safeguarded or protected as alleged in para. 19 (a) of the plaint?

3. Are the preliminary decree, the final decree and the sales and the proceedings in the mortgage suit valid and binding on the plaintiffs?

4. Was the mortgage not made for any legal necessity on benefit of the estate as alleged in para. 10 of the plaint?

5 (a) Was Bisseswar Singly the karta or senior member of the joint family?

(b) Was he the authorized agent of his co-mortgagors?

6. Was Probodh Chandra Singh, deceased, a lunatic as mentioned in para. 2 of the plaint?

7. Is the mortgage valid and binding on the plaintiffs?

6. On the question of legal necessity, prima facie it is for the lender either to prove it, or that he made reasonable enquiry as to the necessity and that the facts represented to him were such as, if proved, would have justified the loan, and where there are minors, the fact that all the adult members consented to an alienation is not, by itself, proof of legal necessity. In view however of the frame of the present suit and the pleadings, the onus of proving lack of necessity is on the plaintiffs and no such evidence has been given: Bhagbut Pershad v. Mt. Girija Koer (1888) 15 Cal 717. Apart from the recitals in the deeds, there is no evidence of legal necessity with regard to any of the loans except the last, except that there is some oral evidence regarding expenditure on house repairs, which is relevant not only with regard to the last loan but to those previous loans alleged to have been incurred partly for house repairs. The loans obtained in 1926 from Mazumdar and Das were clearly not for any legal necessity of the family nor for the benefit of the estate. The question of onus however is academic, because in my opinion the oral evidence on behalf of the defendant S. N. Mitter is sufficient to establish that he made reasonable enquiries as to the legal necessity for the loan in 1929, and the facts represented to him were sufficient to justify the loan. This is sufficient to dispose of the case in favour of the defendant S. N. Mitter.

7. Apart from these considerations, the minors are under a pious obligation to discharge the debts incurred by their fathers, Jogeswar and Probodh-and both of the latter were undoubtedly liable in respect of the money lent in 1929, which, with the exception of Rs. 500 owing to Mazumdar, with which Probodh was not concerned, and Rs. 2630-14-2 owing to Das, with which Sidheswar and Jogeswar alone were concerned, was borrowed in order to pay off antecedent debts: Brijnarain v. Mangla Prasad (1924) 11 AIR PC 50. The evidence concerning Probodh's lunacy is very conflicting, and that given on behalf of the plaintiffs is unconvincing. The onus is upon them, and I am not satisfied that they have discharged it. His lunacy has not been proved. I was particularly impressed by the evidence of the pleader Promode Kumar Banerjee. He struck me as a thoroughly truthful, impartial, careful and reliable witness. I accept his evidence, without hesitation or qualification. None of the adult members of the family have come forward to give evidence, and the case for the minor plaintiffs has obviously been advanced in order to try and save some small part of the family property from total loss. If there be any collusion in this case, it exists more probably between the plaintiffs and the Singh defendants, than between the latter and the defendant Mitter. The rest of the issues I find in favour of the defendant S. N. Mitter and there must be judgment in his favour with costs.