Privy Council Appeal No. 51 *of* 1940
Patna Appeal No. 17 *of* 1936

Krishna Kant Prasad Shukul and another – – – *Appellants*

v.

Dhanu Lal Choudry and others – – – – – – *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT PATNA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH OCTOBER, 1943

Present at the Hearing:
LORD THANKERTON
LORD PORTER
SIR GEORGE RANKIN
[*Delivered by* SIR GEORGE RANKIN]

The appellants are the two minor sons of the ninth respondent Bate Krishna Prasad. By their mother Sm. Avadesh Dulari Debi they sue to have a mortgage decree dated 18th December, 1931, set aside as against them and to establish that their interest in the joint family property is not liable for the monies due thereunder. The mortgagees who obtained the decree of 1931 are the respondents 1 to 7, herein called the respondents. The eighth respondent is a puisne mortgagee and need not be further mentioned.

The present suit was brought on 26th July, 1933, in the Court of the Subordinate Judge at Muzaffarpur. The appellants succeeded in the trial Court whose decree was dated 16th December, 1935, but the High Court at Patna on 9th March, 1939, dismissed their suit.

The mortgages in question are three in number and were executed by the appellants' father (respondent No. 9) in terms which purport to bind their interests.

(1) The first dated 19th July, 1924, was for Rs.20,000. Apart from a small sum of Rs.200 and a sum of Rs.400 borrowed to pay the costs of the mortgage, this loan was expressed to be made—as to Rs.9098, to pay off a previous loan made by the respondents on a bond dated 16th August, 1917; as to Rs.4650, to pay off a decree in favour of one Shyam Nundan Sahay; and as to Rs.5650 to meet a decree for maintenance obtained by a lady called Deokeshari. These debts were not incurred for the benefit of the joint family but as antecedent debts of the father, respondent No. 9, they have been held by the High Court to come within the principle that a father can mortgage the joint property to discharge a debt contracted by him for his own personal benefit.

(2) When the second mortgage, dated 28th March, 1925, came to be made it appeared that the whole sum of Rs.5650 had not in fact been paid to Deokeshari but only Rs.2600; and that she was taking execution proceedings for the balance which by this time amounted to Rs.7300. Apart from Rs.255 borrowed for the costs of the mortgage, Rs.4745 was taken to save certain properties which had been put up for sale. The High

Court have found that the mortgagees took care to see that the money was this time applied to the discharge of the maintenance decree but that a stay of the sale could not be obtained; and that in the end the money or the bulk of it was expended for the purpose for which it was taken by buying back the properties in the name of a nominee.

(3) The third mortgage was on 18th May, 1926, for Rs.2500. Of this, Rs.2090 was expressed to be taken to pay off one Noorullah or Sadhulia Khan who had lent money on a hand note to meet revenue and cesses, repairs to the family house and for clothes. The rest was said to be necessary to meet medical expenses. The High Court have found that there was such a hand-note, and that it was paid off with the money borrowed for the purpose.

On the merits the appellants' case which the trial Judge accepted was that their father, respondent No. 9, was addicted to evil habits, was borrowing the monies in question for immoral purposes and was spending it upon intoxicating drink and prostitutes. In addition to a body of general evidence as to his bad character and depraved habits, the appellants made a positive case that the sum exceeding Rs.10,000 received by him from the first mortgage (19th July, 1924) or the great part of it was immediately squandered upon prostitutes. They called four witnesses to prove the division of the money among such women. The trial Court accepted their evidence; but the High Court regarded them as unworthy of credit and on a careful examination of their evidence rejected their story as one which had broken down. Their view in the end was that however successful the appellants may have been in attacking their father's character, they have not succeeded in connecting the loans which are now in question with the immorality alleged.

The initial difficulty of the appellants is to get behind the mortgage decree of 1931 which was passed against them in a suit (No. 92 of 1930) in which, by one Mahendra Prasad Sinha a pleader as their guardian *ad litem*, they had contested the claim of the mortgagees. A written statement filed on their behalf had denied the passing of any consideration for the mortgage bonds, and pleaded that there was no legal necessity for the loans and no benefit to the family. A careful judgment dealt very fully with the consideration for the loans at the instance of the guardian and also of a puisne mortgagee who also had put the mortgagees to strict proof of their claim. The execution of the bonds was held to have been proved, as also were the various payments, including the payment of Rs.10,502 under the first mortgage by a cheque on the Benares Bank at Muzaffarpur. The learned Subordinate Judge dealt separately with each of the three loans, finding that the first was for antecedent debt and for legal necessity, that due enquiry as to legal necessity had been made as to the second, and that the third was for legal necessity. The appellants, notwithstanding their guardian's strenuous contest on their behalf, claim to reopen the question of their liability on the bonds by introducing as a new defence an allegation that the loans were taken by their father for immoral purposes or to discharge antecedent debts incurred for such purposes. They say also that their mother should have been appointed to be their guardian in the mortgage suit and that had she been guardian she would have put forward the immoral habits of her husband as a defence. On this question the Courts in India have differed in opinion. The learned trial Judge has held that the mortgagees fraudulently concealed the fact of the mother's existence, that the pleader guardian was negligent, and that the minors were not represented or not properly represented in the mortgage suit. The High Court have negatived these findings of fraud and negligence and hold that there were reasons against the appointment of the mother as guardian and that even if it was wrong to pass her over this was at most an irregularity which would not entitle the appellants to have the decree set aside.

Their Lordships find themselves in agreement with the High Court upon this aspect of the case. There is no evidence that the mortgagees concealed the fact of the mother's existence from the Court in the mortgage suit or

practised any species of fraud or concealment. Indeed while the order sheet in that case was put in evidence the mortgagees' petitions and affidavit are not even in the record, though the present case was begun only two years after the mortgage suit was decreed. Hence the exact statements made to the Court by the mortgagees are not proved. The evidence shows the pleader guardian to have done all that he properly could. He even asked to be allowed expenses for a journey to the appellants' village to collect information on the spot, but this the learned Judge in his discretion refused, intending him to get his instructions by post. In their Lordships' view no case of fraud or negligence can be seriously maintained, and the sole question which requires consideration is whether there was in the appointment of a pleader guardian an element of irregularity which has prejudiced the minors. In the plaint it is falsely stated that no notice of the mortgage suit was served on respondent No. 9 and it is alleged that " without issue of any other notice a pleader was appointed as guardian *ad litem* for the plaintiffs." That the mother should have been appointed is not pleaded, and their Lordships think that the Court might very properly regard her as being in this case like her husband a person with an interest adverse to the minors, unlikely as a purdanashin to be capable of handling troublesome litigation and only too likely to be under the influence of her husband. She was not the natural guardian of the minors. The mortgagees were wrong in thinking that respondent No. 9 had not an interest adverse to the minors but they did no more than was usual when they put forward the name of respondent No. 9 as being the natural guardian and as the person in whose care the minors were. He had to have notice but if the Court had appointed him then indeed the minors would have had a grievance as his interest was adverse. What happened was that he refused service and the notices had to be affixed to a door at his residence. The plaintiffs on 17th September, 1930, asked the Court to appoint someone else and on 10th November they were ordered to take steps to have a registered card issued to him by the Court. A number of such communications were sent to him. The pleader was not appointed till 17th November. In January, 1931, the respondent No. 9 appeared and asked for time to file his defence: he was given time till the 12th March but made default; and the case was not heard till the following November.

It appears that the fourth clause of r. 4 of O. 32 of the Code was in 1927 amended by the Patna High Court so as to substitute for the words " where there is no other person fit and willing to act as guardian for the suit " other words: viz. " where the person whom the Court . . . proposes to appoint as guardian for the suit fails . . . to express his consent to be so appointed." The substance of the matter, in any case, is that the appointment of a pleader guardian was the most sensible and proper course to take in the interest of the minors. Their Lordships are far from thinking that a charge of immorality against respondent No. 9 would have been of any service to the minors in that suit, but in any view of the matter, the absence of this line of defence is not to be attributed to irregularity in the appointment of the guardian. A very full enquiry was made into the circumstances of and the consideration for the loans and in their Lordships' judgment no good reason has been shown for setting aside the decree which was passed.

They will humbly advise His Majesty that this appeal should be dismissed. The appellants must pay the costs of the respondents Nos. 1 to 7, who alone appeared.

(28599) Wt. 8226—23 150 11/43 D.L. G. 338

In the Privy Council

KRISHNA KANT PRASAD SHUKUL
AND ANOTHER

v.

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DELIVERED BY SIR GEORGE RANKIN

Printed by His Majesty's Stationery Office Press,
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