

Constitutional Writ

Present: The Hon'ble Mr. Justice Jayanta Kumar Biswas

Judgment on 25.08.2010

W.P. No.17430 (W) of 2010

Nisith Kumar Manna & Anr.

v.

The State of West Bengal & Ors.

Points:

Scope of Writ-Property mortgaged by fraud or not- can writ court decide the question-Constitution of India Art 226

Facts:

The petitioners challenged the notice the Corporation whereby corporation informed the petitioners that since the mortgagor was in default on the mortgage-money, it would initiate appropriate action, unless the loan was liquidated within the period mentioned in the notice. On the strength of a general power-of-attorney executed by the petitioners Nikhil mortgaged the property to the Corporation by depositing the title deeds by exercising fraud. By the power-of-attorney Nikhil was authorised only to sell the property, not to mortgage.

Held:

The question whether Nikhil created the mortgage by exercising fraud cannot be decided without taking down evidence. The petitioners' remedy, if any, was before the Civil Court. Court does not find any reason to entertain the petition for adjudicating the question in exercise of power under art. 226. The petitioners are not entitled to any relief from the Writ Court. Para 5

Mr. Gora Chand Samanta, advocate, for the petitioners. Mr. B. R. Patranabish, advocate, for the State. Mr. Amiya Kumar Sur, advocate, for the second respondent.

The Court: The petitioners in this art. 226 petition dated August 13, 2010 are aggrieved by the notice dated July 20, 2010 (at p. 36) issued to them by the West Bengal Financial Corporation.

2. The Corporation claimed that the property, particulars whereof were incorporated in the notice, was mortgaged to them by one Nikhil Manna, the third respondent, on the strength of a power-of-attorney executed by the petitioners. By the notice the Corporation informed the petitioners that since the mortgagor was in default on the mortgage-money, it would initiate appropriate action, unless the loan was liquidated within the period mentioned in the notice.

3. The petitioners and Nikhil are brothers. In 1989 the three brothers jointly purchased the property. Under a conveyance dated July 29, 1994 they sold it to one Soumitra Banerjee and one Suman Banerjee. Then under a conveyance dated August 5, 1994 the petitioners purchased it from Soumitra and Suman. On the strength of a general power-of-attorney executed by the petitioners Nikhil mortgaged the property to the Corporation by depositing the title deeds on October 19, 1996.

4. Counsel for the petitioners has argued as follows. Nikhil created the mortgage by exercising fraud. By the power-of-attorney Nikhil was authorised only to sell the property, not to mortgage. Hence the mortgage cannot be enforced against the petitioners.

5. The Corporation has produced the original 1989 conveyance. The question whether Nikhil created the mortgage by exercising fraud cannot be

decided without taking down evidence. In my opinion, the petitioners' remedy, if any, was before the Civil Court. I do not find any reason to entertain the petition for adjudicating the question in exercise of power under art. 226. The petitioners are not entitled to any relief from the Writ Court.

6. For these reasons, I dismiss this petition making it clear that nothing herein shall prevent the petitioners from approaching the Civil Court, and that, if approached, the Civil Court shall decide all questions according to law. No costs. Certified xerox

(Jayanta Kumar Biswas, J.)

