

(1963) 03 MAD CK 0046

In the Madras High Court

Case No : Second Appeal No. 884 of 1960

Arnlayi Nadachi and Another

APPELLANT

Vs

Jagadeesiah Nadar and Others

RESPONDENT

Date of Decision : 29-03-1963

Acts Referred:

Evidence Act, 1872 — Section 115

Transfer of Property Act, 1882 — Section 43, 65

Citation : AIR 1964 Mad 122 : (1963) 76 LW 603

Hon'ble Judges : S. Ramachandra Iyer, C.J.;Venkataraman, J

Bench : Division Bench

**Advocate : A. Subramania Iyer and C.S. Sahasranamam, for the Appellant;
Jose, Padmanabhan, V. Ganapatisubramania Iyer and M.S. Dhanakodi Pillai, for
the Respondent**

Judgement

S. Ramachandra Iyer, C.J.—This second appeal arises out of a suit instituted for redemption and partition. The claim is now¹ concerned only with regard to the title to item No. 1 of the properties set out in the plaint, namely, S. No. 8603, originally Lakkom 332, covering an extent of 1-47 acres.

2. Defendants 3 and 6 are the appellants. For a proper appreciation of the question involved in this appeal it will be necessary to advert briefly to the tangled history of the various transactions with respect to the property which originally belonged to one Gunamudayan. He had two wives. By the first wife he had a son, Aseervatham. By his second wife, who was named Nakshathram, he had two sons, the elder of whom died before the Travancore Christian Succession Act came into force and whose rights devolved on his death on his younger brother Yovan alias John, whom we shall hereafter refer to as John. (Sr.). His son, John (Jr.) was the first plaintiff in the suit, -the second plaintiff being an allenee from him.

3. The property now in dispute was mortgaged alone with certain other properties in the year 1899 by Gunamudayan to his daughter-in-law, that is. the

wife of Aseervatham. After the mortgagor's death, there was a partition suit in the family and by the appellate decree of the Travancore High Court passed in 1917 each one of his heirs, namely, Aseervatham, Nakshatram and John (Sr.) became entitled to a one-third share of the properties covered by the decree, item 1, in the present suit being one of them. John (Sr.) was evidently treating his mother's share as his own. He created a number of mortgages over the two thirds share of the property (which was merely an equity of redemption, as the same was subject to a mortgage in favour of Aseervatham's wife). Alagappa, one of the creditors who obtained a mortgage from John (Sr.), filed a suit on his mortgage, obtained a decree and purchased the suit property in Court auction in 1925. He also obtained symbolical delivery of possession.

Another mortgagee, Shanmugham, took similar proceedings and purchased in the year 1936 the two-thirds share mortgaged to him. There was also delivery of symbolical possession in his case. The former purchaser, that is, Alagappa, then instituted a suit for redemption of the other created by Gunamudayan in the year 1899. After obtaining redemption, he took possession of the property redeemed, in The year 1942. Both Alagappa and Shanmugham sold their interest in the suit property to the sixth defendant, the former giving possession on the property as well. That was in the year 1948. In the meantime events Happened in the family of the mortgagor. In the year 1940 Nakshathram, who had a third share in the property died. She was succeeded by her son John (Sr.) in regard to that portion of the property which even during her life-time he had included in the mortgages which he executed in favour of Alagappa and" Shanmuga. John (Sr.) died in 1954 leaving behind him John (Jr.) and another son who had been impleaded as the fourth defendant to the suit.

It will be seen from the above statement of facts that at the time when John (Sr.) created the mortgages in favour of Allagappa and Shanmugham over the two-third share of the suit property, he actually had right to the extent of only a one-third share therein, the other third share belonging to his mother Nakshatram. This was the position even when the Court sales and delivery in pursuance thereof took place. Later John (Sr.) succeeded to his mother's one-third share. That was in the year 1940, long after the Court sales in execution of the decrees obtained by the mortgagees, Alagappa and Shanmugham. In the ordinary course that property which John (Sr.) Obtained as heir to his mother must have been inherited by his own sons John (Jr.) and the fourth defendant.

4. The sale certificates in favour of Alagappa and Shanmugha whose successor-in-interest is the sixth defendant describes that what was sold was two-thirds share in the property. The sixth defendant claimed that he would be entitled to the entire two-thirds interest notwithstanding the fact that on the date of the Court sales the judgment debtor John (Sr.) did not have any right beyond one-third. On the other hand, the case for the plaintiffs was that notwithstanding the recital in the sale certificates that two-thirds share was sold, what could be and was sold was only the right, title and interest of John (Sr.) on the date of the

sale, namely, a one-third share in the property. The other third share which John (Sr.) subsequently inherited and which passed to Ms sons on his death belonged to them, and they being thus co-owners with the sixth defendant are according to them entitled to redeem their share of the property by paying an aliquot share of the mortgage money paid by Alagappa.

5. The question to be decided in this appeal is whether, where a person creates a mortgage over a larger interest in a property than what he himself possesses and the mortgage is put in auction and in the Court sale in execution the entire mortgaged property is sold and subsequent there to the mortgagor obtains by inheritance or otherwise full or additional interest in the property, the Court auction purchaser will be entitled to claim the benefit of such acquisition of title by the mortgagor.

6. The learned District Munsiff answered that question in the affirmative, holding that the principle of Section 43 of the Transfer of Property Act of feeding the grant by estoppel would apply to such a case.

7. On appeal the learned District Judge came to a contrary conclusion, holding that the rule of feeding the grant by estoppel would not apply to Court sales where the purchaser would get only the right, title and interest of the judgment-debtor existing on the date of the Court sale. That, in the instant case, being only a one-third in the suit property, the sixth defendant could not obtain anything more than that fraction. Accordingly the appeal was remanded for passing a decree for redemption and partition.

8. There can be little doubt that the view accepted by the learned District Judge that Section 43 of the Transfer of Property Act could not be invoked in the present case is correct. It is true that John (Sr.) who had only a one-third share in the property represented to the mortgagee that he had a two-thirds share therein, and created a security over the two-thirds share. u/s 65(a) of the Transfer of Property Act John (Sr.) should be deemed to have contracted with the mortgagee that the extent of the interest represented by him as belonging to him subsisted and that he had power to create a mortgage over it. But actually his interest was just a moiety of the interest mortgaged. The security of the other one-third share was only in the nature of spes successionis but that circumstance by itself will not prevent the applicability of Section 43 if later on he obtained his mother's property by inheritance. This has been settled by a decision of the Full Bench in *In Re: A. Vaidyanatha Iyer*, where it was held that even where a transferor in fact purported to transfer an expectancy or property which he had no right to transfer, Section 43 of the Transfer of Property Act would apply. But there is however another impediment to the case of the sixth defendant. Subsequently acquired property will vest in the transferee or ensure for his benefit, only if the subsequent acquisition by the transferor takes place during the time when the contract of transfer is subsisting.

Mr. Jose appearing for the respondents contends that the contract evidenced by

the mortgage in the instant case must be held to have come to an end with the passing of the decree, the former having merged in the latter, and any acquisition of property made by the mortgagor thereafter would not be available either to the decree-holder or to the purchaser in Court auction. In support of that contention learned counsel relied on two decisions in *Nanakchand v. Gandu Ram*, AIR 1938 Lah 360 and *Kamta Rai Vs. Nand Kishore and Others*, . The former was a case of a Court sale in execution of a money decree. At the time of the sale the judgment-debtor was not entitled to the property that was sold, but he became entitled to it subsequent thereto. It was held that the equitable principle recognised in Section 43 of the Transfer of Property Act would not apply to the case as there was no warranty of title in a Court sale. The same principle was accepted in the second of the cases referred to above where it was held that Section 43 of the Transfer of Property Act would have no A. I. R. application to an auction sale as the judgment debtor could not be deemed to have guaranteed any title in himself when his property was sold in execution of a decree and that no principle of estoppel could be invoked in such a case. It is not very clear from the report whether the sale was in execution of a money decree or of a mortgage decree.

9. In *Ajijuddin Sahib v. Budan Sahib*, ILR 18 Mad 492, a Muhammadan mother and her eldest son executed a mortgage comprising the interest of her younger children as well. Subsequently a decree was passed on the basis of the mortgage against the mortgagors as well as the other children of the first mortgagor. But the terms of the decree affected only the shares of the co-mortgagors. After the passing of the decree, the share of the co-mortgagors, that is, the mother and her eldest son, were increased by reason of the death of one of the other children before the decree was executed. The learned Judges held that although the additional share which was sought to be proceeded against in execution of the decree was not included in the mortgage, there was nothing in the decree to prevent the sale of such interest which subsequently developed on the two mortgagors and that the clause "at any time during which the contract of transfer subsists in Section 43 was wide enough to cover the case. This decision has been criticised in Mullah's Transfer of Property Act, 4th Edn, page 203, thus:

"This was a correct order having regard to the terms of the decree but the Court erred in saying that the contract of transfer subsists as long as the decree passed in the suit to enforce it was not executed."

Weighty as the opinion of the author is, we are not able to share his view. A mortgage decree generally directs the sale of the property mortgaged and in a case where the mortgagor had mortgaged a property not belonging to him or a larger extent than that belonged to him, the decree in the absence of an adjudication as to the precise title of the mortgagor, would generally direct the sale of the mortgage property. There will therefore be jurisdiction in the Court (as between the parties) to sell that property. If a sale takes place, what will be purchased by the Court auction purchaser would be the right, title and interest of

the judgment-debtor as on the date of the sale. If prior to the date of the sale, the judgment-debtor had obtained title to the property or title to a larger share in the property, it stands to reason that that interest should be available to the decree-holder for being proceeded against in execution. This will be clear if the principle behind the rule is understood.

10. In Coole's "Law of Mortgages" 9th Edn. Vol. II, page 818, referring to the acquisition of good title by the mortgagor it is stated thus:

"If the mortgagor's title be altogether defective, and he afterwards acquires a good title, he can be compelled to make good the defective conveyance. Where a mortgagor has executed a mortgage of land purporting to pass the legal estate, which in fact he did not possess at the time, the subsequent acquisition by him of the legal estate was held to "feed the estoppel" created by the mortgage so as to pass the legal estate effectively to the mortgagee."

That was a case of an English mortgage. The scope or the principle which has been statutorily recognised in Section 43 of the Transfer of Property Act can be understood as if we refer to the law in English on which that provision is based. In, *Poulton v. Moore*, 1915 1 KB 400, Phillimore L.J. said:

"With regard to the question of estoppel by recital in a deed, it is truly said that the law of estoppel in the case of real property is different from the law of estoppel as between persons. It is the law which operates when a grantee of land has had a conveyance of the whole interest in the land from a grantor who himself at the time had only a partial interest in the land. The former then has a right, when the grantor gets the entire right in the land, to say as against all the world that that interest has passed to him. It does not then depend upon the mere representation by the grantor that he had the whole interest. The estate feeds the estoppel, and therefore ceases to be an estate by estoppel only and becomes an interest."

To put it in other words, once the transferor acquires the interest, that interest enures by reason of the pre-existing interest to the benefit of the transferee. This rule was accepted in *Sankari Ammal Vs. Ramachandra Ayyar*, , where the learned judges said:

"So that during the period between the date of the transfer and the date of the acquisition of the interest by the translator the title is only in region of estoppel as between the transferor and the transferee; but thereafter it passes beyond that sphere and becomes an interest in the property itself, which title is good against all the world."

11. Under the CPC a mortgagor would be entitled before the Court sale of the mortgaged property is confirmed to have the sale set aside by payment of the amount due under the mortgage together with a solarium. Although that right is statutory, it can be said that to that extent the relationship of mortgagor and mortgagee, subsists. In our opinion, therefore, the mere fact that the mortgage

is superseded by or merged in a decree will not prevent the operation of Section 43 of Transfer of Property Act, in regard to a property acquired before the date of the sale by the mortgagor. Such property, as soon as it is acquired by the mortgagor, will feed the estoppel which is existing by virtue of the representation contained in the document of mortgage as well u/s 65(a) of the Transfer of Property Act. We are therefore of opinion that the decision in ILR 18 Mad 492 is correct and the criticism of the same to which we have made reference earlier is incorrect.

12. Even so, the mortgagee will have the benefit of Section 43 only in regard to the acquisition made by the mortgagor before the date of the sale. But once the property is sold and satisfaction has been entered in respect of the claim, the contract of mortgage could no longer be held to be subsisting for the application of Section 43. In other words, if a mortgagor acquires title to the mortgaged property, which he purported to give as security, subsequent to the Court sale in execution of the mortgage decree, the purchaser would not be entitled to invoke to his aid the rule of feeding the grant by estoppel, as the contract of mortgage could not be regarded as subsisting beyond the time when he purchased the property. To hold otherwise will lead to uncertainties in Court sales. Years after the purchase a Court auction purchaser might make a claim for properties subsequently acquired by the mortgagor, although he might have paid the price only for the right, title and interest of the mortgagor which was put up for auction and as at the date of the sale. We, therefore, agree with the learned District Judge that the sixth defendant will not be entitled to the one third share inherited by John (Sr) from his mother subsequent to the Court sale by virtue of Section 43 of the Transfer of Property Act.

13. Learned counsel appearing for the appellants has however contended that as Section 65(a) of the Transfer of Property Act creates a warranty of title by the mortgagor in favour of the mortgagee and expressly provides that the benefit of such warranty would be annexed and go with the interest of the mortgagee, the purchaser in a Court auction under a mortgage decree being entitled also to the mortgagee's rights would be entitled to have the benefit of the covenant. There is an underlying fallacy in the argument. What Section 65(a) provides is a covenant for title. The mortgagee can avail himself of the covenant and if that is broken, sue the mortgagor for damages. This is illustrated by the decision in *Perumal Konar Vs. Maruthanayagam Nadar*, where, after a court sale under a mortgage decree, it was found that the mortgagee sustained loss by reason of the breach of the covenant of title and it was held that the mortgagor was bound to make good the loss to the mortgagee. The same principle has been accepted in an earlier case, *Dugadass v. Mohamed Ismail*, 1908 All WN 155. That principle also shows that the mortgagee is entitled to enforce the covenant by executing the decree against the mortgagor in case of deficiency. In other words, if the mortgage had not been previously satisfied by sale of the one-third share which belonged to John (Sr.) and there was a balance outstanding, it would undoubtedly be open to the mortgagee to bring to sale the one-third inherited by

him from his mother. That will be a case where the contract itself, not having been fully satisfied, will be alive.

14. Section 65(a) of the Transfer of Property Act will not, therefore, avail the sixth defendant for making a claim to Nakshatram's one-third share.

15. At one stage of the case we felt a doubt whether it would be open to the plaintiffs who are the successors-in-interest of John (Sr), the judgment-debtor in the mortgage suits, to go behind the terms of the sale certificates and show to the Court that something else than what the sale certificates purported to do was actually sold. In other words, whether the sale certificates which purported to convey a two-thirds in the suit property, can be construed as conveying only a one-

16. In *Ramabhadra Naidu v. Kadiriyasami*, ILR 44 Mad 483 : AIR 1922 PC 252, the Privy Council held that where, upon sale under a mortgage decree, the purchaser had been given a sale certificate which plainly included certain property of which possession had been given to the purchaser, it would not be open to a Court in a sub-sequent suit by the mortgagor's, representative to show that the property in question was not sold under the decree. But Mr. Jose appearing for the respondents contends that that decision will not apply to a case where at the time of the sale the judgment-debtor had no title to the property. We consider that there is force in this contention. The rule can be stated thus. If at the time when the properties were brought to sale the mortgagor had the interest sold, it would obviously not be open to him once the sale certificate in respect of it had been issued to challenge the extent of the property conveyed (where the sale certificate is clean in a subsequent suit). But where he had no such interest on the date and the Court auction purchaser only obtains his right, title and interest in the property as on that date, it would not preclude the judgment-debtor from contending that an interest subsequently acquired did not pass to the purchaser unless he were bound by any rules of estoppel.

17. This leads us to the next question in the case. As we said, it was John (Sr) that made the representation to the mortgagee that he had a two-thirds interest in the property. Relying on that representation, the mortgagees advanced monies and they took further steps for filing a suit for bringing to sale that property. Apart from any question of feeding the grant by estoppel, we are of opinion that the ordinary rule of estoppel recognised, in S. 15 of the Evidence Act will preclude John (Sr) and his representatives from saying that he had no right to mortgage anything except one-third of the property. This aspect of the rule of estoppel has been laid down in the leading decision of the Privy Council in *Sarat Chunder Dey v. Gopal Chunder*, ILR 20 Cal 296. The main consideration for determining whether such an estoppel arises or not is to see whether the representation has caused the person to whom it is made to act on the faith of it. If he did so, then the other party should be precluded from saying anything to the contrary. In that case a lady, who was not the real owner of the property but a mere benamidar, mortgaged the property, her son representing her as agent in

the transaction. Actually the property belonged to her son. The mortgage was ultimately put in suit and a person purchased a part of the property. The son, the real owner, also sold the property. It was held that as the son by his conduct had represented that his mother had the right to mortgage, neither he nor his representative in estate could be allowed to deny the truth of such a representation which had been acted upon by the mortgagee. Though this decision had not been referred to, it was this rule that was applied by the Calcutta High Court in *Saroda Prosad Banerjee and Others Vs. Gosto Behari Hazra and Others*, . That was a case of two co-sharers in a Dayabagh family consisting of three, creating a mortgage representing to the mortgagee that they were entitled to deal with the whole interest of the property although the third co-sharer did not join in the mortgage. The interest of the third co-sharer subsequently vested in one of the other co-sharers. The question arose whether the interest of the third co-sharer which subsequently devolved upon one of the surviving mortgagors would enure for the benefit of the Court auction purchaser under the mortgage decree. The learned Judges held that the mortgagor who subsequently obtained the property was bound by estoppel created by the statement made by him in the mortgage deed.

18. There is thus a distinction between the rule of estoppel contained in Section 43 of the Transfer of Property Act and the one contained in Section 115 of the Indian Evidence Act. In the former, estoppel which exists by reason of the representation has the effect of transferring the property to the purchaser the moment the transferor obtains the same during the subsistence of the contract. In the latter case there is no question of any transfer of property or of feeding the original grant. The person who makes the representation and his successors are merely precluded from denying that they did not have the interest which by reason of their representations they made the transferee to believe and act upon such belief to their detriment. In the case before us although the 6th defendant would not be entitled to claim the benefit of Section 43 of the Transfer of Property Act, he could prevent the plaintiffs from claiming that John (Sr) had subsequently acquired the one-third share of the property and that his right so acquired would not pass to the purchaser. We therefore set aside the decree of the lower appellate Court and restore that of the trial Court. There will be no order as to costs in the circumstances of this case.