

(1925) 03 MAD CK 0005
In the Madras High Court

A.V.K. Mayappa Chettiar

APPELLANT

Vs

N.K.L. Kolandaivelu Chettiar and Another

RESPONDENT

Date of Decision : 26-03-1925

Acts Referred:

Transfer of Property Act, 1882 — Section 83

Citation : AIR 1926 Mad 597 : 92 Ind. Cas. 715

Hon'ble Judges : Kumaraswami Sastri, J

Bench : Single Bench

Judgement

Kumaraswami Sastri, J.—This is an application to set aside the order of the Subordinate Judge who dismissed the suit as against the

second defendant holding that he was an improper party. The suit was filed by the plaintiff to enforce specific performance of a contract to

purchase certain property for Rs. 70,000. There was a mortgage over the property created by the predecessor-in-title of the first defendant, who

was the person who contracted to sell the suit property to the plaintiff, for a principal sum of Rs. 50,000. The first defendant denied that the

mortgage was binding on the property on the ground that it was a fraudulent and collusive transaction entered into by the predecessor-in-title

through whom he claims for the purpose of defrauding the creditors and that any consideration passed for that mortgage. The plaintiff, who had

agreed to purchase the properties got a varthamanam letter, Ex. C., whereby the first defendant agreed to indemnify the plaintiff against all claims

by third persons. The plaintiff in this suit joined both the first defendant who was the person with whom he entered into the contract to sell, and the

second defendant who was the person who claimed as a mortgagee under a mortgage created by the predecessor-in-title of the first defendant for

a principal sum of, Rs. 50,000 the interest on which would amount to a great deal more, the defendants inter se disputing the validity of the mortgage, the first defendant saying that there was no mortgage which can be enforced against the property and the second defendant that it was a valid mortgage.

2. Now the difficulty in this case is as to what the plaintiff has to do? If the second defendant is discharged from the suit, the plaintiff would be in the position of having to pay the second defendant the full mortgage-money which, the first defendant may draw out, and the day after there might be a suit against the plaintiff on the mortgage under which the second defendant claims, and, if the first defendant's case that the mortgage was fictitious or a sham transaction is not true, then the plaintiff would have to pay that amount over again. It was suggested that the plaintiff might pay the money in Court u/s 83 of the Transfer of Property Act and leave it to the defendants to fight out the question ; but the trouble is that the plaintiff on the date of the suit was merely an individual in possession of an agreement to sell and Section 54 of the Transfer of Property Act says that a contract for the sale of Immovable property is a contract that a sale of such property shall take place on terms settled between the parties and that it does not of itself, create any interest in or charge of such property; the plaintiff, therefore, is a person who, by reason of the agreement to sell, has no interest in the property.

3. As regards the paying of money into Court u/s 63, the section states that the person who can deposit in Court would be a person who could file a suit for redemption. It says that the mortgagor or any other person entitled to institute such suit (that is a suit to redeem) may deposit the money into Court. Section 91 enumerates the persons who may redeem and a person who has merely got an agreement to sell the property does not fall under any of these categories. So that, the remedy u/s 83 is not open to the present plaintiff.

4. Turning to the Specific Relief Act, we find in Clause (c) of Section 27, (which states against whom a contract can be specifically enforced) that it can be enforced against "" any person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displaced by the defendant."" in this case the first defendant, if his case is true, can file a

suit against the second defendant to have that mortgage declared invalid and not binding, so that he can displace a title which was created by his predecessors-in-title. Section 27, therefore, seems to me to provide for a case like the present and enable the plaintiff to file a suit against the first defendant who executed the agreement to sell and the second defendant who claims under a title of the first defendant, which title the first defendant can file a suit to displace, on the ground that it was a fraudulent transaction brought about to defraud the creditors and that no consideration passed therefor. It seems to me that, in a case like the present, the only convenient course would be to allow both the first defendant, who executed the agreement, and the second defendant, who claims under an encumbrance, to be joined as parties, whereby the dispute between the person who claims an interest in the property as a mortgagee may be settled. That is the only safe way of keeping the plaintiff really indemnified. In that suit if it is decided that the mortgage is valid, the money which the plaintiff has paid into Court under the decree would be appropriated in such a way as to keep the plaintiff free from all future troubles. I see very little justice in making the plaintiff, in a suit like this, pay the money into Court, and allowing the defendant to draw the money and then leaving the plaintiff at the mercy of the person who claims under a mortgage which he can enforce later on with interest for the intervening period, for that would be the result of striking out the second defendant in a case like this and letting the suit to proceed against the other party.

5. Reference was made to the fact that in the varthamanam letter there is actually a promise to indemnify the plaintiff against any loss ultimately sustained, and that, till the loss is sustained, the plaintiff has to pay the money and take his chance of getting it back or not under the indemnity clause. I think the decisions cited by Mr. Patanjali Sastri, are in favour of the view that it is not necessary that actual damage should be caused before the party affected can act. In *Wolmershausen v. Gullick* 68 L.T. 753 and *Eastern Shipping Co. v. Quah Beng Kee* 130 L.T. 462 : 40 T.L.R. 109 the person who was ultimately to pay was made a party. The case of the plaintiff here is this: He has got an agreement to sell; that the person who has got to sell denies that there is any mortgage on the property which is binding on it; and there is the second defendant who claims

under a mortgage not executed by a stranger claiming a paramount title but by the predecessor-in-title of the first defendant. There is also an

indemnity clause in the varthamanam letter saying that he should be indemnified against any loss he may sustain if rival claims were established.

Now, the plaintiff naturally says ""I am ready to pay money to the first defendant as I am bound to do under the contract. If there is any mortgage, I

am entitled to see that the money is paid to the discharge of the mortgage, so as to give me a clear title. Therefore let that question be decided

before the money is paid into Court."" Clause 18(c) of the Specific Relief Act says:-- ""Where the vendor professes to sell unencumbered property,

but the property is mortgaged for an amount not exceeding the purchase-money, and the vendor has in fact only a right to redeem it, the purchaser

may compel him to redeem the mortgage and to obtain a conveyance from the mortgagee."" I see there is nothing either in justice or in equity to

compel this to be done by a separate suit, and where the vendor says that there is no mortgage which he has to redeem and that the mortgage set

up was a sham transaction, I see nothing to prevent that question being tried if the suit for specific performance itself by making the person who

claims a title a party to that suit, where that party claims under a sale created by the vendor's predecessors-in-title. Having regard to these

considerations it seems to me that, in cases like the present, the just and proper course will be to implead the person who claims to be a mortgagee

and to adjudicate on all these questions in the suit itself so as to enable the purchaser to be free from all future risk and liability. Unless I am

compelled to hold by any provisions of the C.P.C., or the Specific Relief Act that such a suit would be bad, I do not see why the most general

principles as to not making persons not parties to a contract parties should stand in the way. There can be no objection to the general rule that

persons who do not claim under the parties to a contract and are strangers to it should not be made parties. There is also the other rule that

persons claiming adversely to both the parties to a suit for specific performance or for redemption of a mortgage ought not to be made parties.

Applying these general principles to the facts of a case like the present it is difficult to see how it can be said that a person, who claims under a

mortgage created by the predecessor-in title of the person who agrees to sell, claims an interest which is hostile to both parties or that he is a

person who ought not to be joined under any provisions of the C.P.C. The Specific Relief Act makes ample provision for protection of the

interests of the person who agrees to buy the property subject to encumbrances. Reference was made by the respondent to the case reported as

Bugata Appala Naida v. Chengalvala Jogiraju (1916) 1 M.W.N. 77. That was a case where a suit for specific performance was filed against a

person who agreed to sell and against a mortgagee on a mortgage created by the person who contracted to sell the property. The mortgage was

with possession. The learned Judges in that case stated that there was misjoinder as regards the mortgagee dealing with the disputes between the

mortgagee and the mortgagor. They say ""Further as the 1st defendant now disputes the validity of the mortgage, the amount due thereunder will be

paid into Court by the plaintiff u/s 83 of the Transfer of Property Act, and if, within three months, the 1st defendant has not taken proceeding to set

aside the mortgage and to establish his right to the money, it will be paid over to the mortgagees."" But the learned Judges unfortunately failed to see

that Section 83 would not cover a case like that, because the vendee (the plaintiff) could not pay the money into Court under that section as he had

no right to redeem, the" property. With great respect, it seems to me that that remedy would not help the parties in this case, because they may be

met by the objection that the money could not be paid into Court u/s 83, Cases have been referred by the respondents" Vakil which relate to

paramount titles set up by a person not a party to the contract, for example Howard v. Miller 112 L.T. 403. That was clearly a case where the

person claiming the property was not a party to the contract but a person who claimed adversely both to the vendor and to the vendee. The cases

reported as Rangayya Reddi v. Subramanya Aiyar 40 Ind. Cas. 429 : 21 M.L.T. 385 and Ahmedbhai v. Dinshaw 13 Bom. L.R. 1061 are cases

where joint family property was agreed to be sold, and it was held that the co-owners who disputed the validity of the transaction were not proper

parties. The claim was by persons not parties to the contract but by persons who claimed adversely both to the person who contracted to sell and

to the person who contracted to buy. I do not think that these cases afford much help in a case where there is a mortgage created by the

predecessor-in-title, which mortgage is attacked, and there is a dispute between the vendor and the vendee as to the validity of that mortgage. It

seems to me that considerations of justice and equity demand that in such a case there should be one suit filed to adjudicate all matters in dispute

and, as I find no decided cases which actually decide the present question, I do not see why the suit as framed should not go on.

6. I reverse the order of the Subordinate Judge and direct that he proceed to try the suit as framed according to law. It will be open to him in the

process of the suit to direct any monies which the parties are legally bound to pay to be paid into Court and to pass such orders as to taking

security or on payment as he thinks fit, I allow the petition with costs against the second respondent.