

(1937) 04 MAD CK 0042
In the Madras High Court

C.K. Samarapuri Chetty

APPELLANT

Vs

P. Thangavelu Chetty and Another

RESPONDENT

Date of Decision : 28-04-1937

Acts Referred:

Citation : AIR 1938 Mad 87 : (1937) 46 LW 778

Hon'ble Judges : Venkataramana Rao, J

Bench : Division Bench

Judgement

Venkataramana Rao, J.—The question involved in this second appeal is whether the mortgage in favour of defendant 2 dated 12th May 1927 is entitled to priority over the plaintiff's mortgage dated 10th March 1927. To determine the point in controversy, a few facts may be necessary. Defendant 1 admittedly was a person who became indebted some time prior to 1927 and this is evidenced by the fact that there was a sum of Rs. 2,000 for principal and interest due to one Motichand: vide Ex. Section It is stated that the amount due to Motichand was also secured by an equitable mortgage evidenced by Ex. 8-a. It is the case of defendant 2 that in order to discharge this equitable mortgage, defendant 1 borrowed from him a sum of Rs. 2,000 on 9th March 1927 on a promissory note bearing the said date and as security for repayment thereof executed also an equitable mortgage evidenced by Ex. 2 a, but he was also desiring to take a registered simple mortgage after he got an encumbrance certificate, assuring himself that there were no encumbrances on the property. This encumbrance certificate was obtained and delivered on 11th May 1927 which disclosed no registered encumbrances on the property. On 12th May 1927 a simple mortgage was executed in his favour for a sum of Rs. 2,500 part thereof being a sum of Rs. 2,185-15-0 being the amount stated to be due in respect of the loan already advanced by him and part thereof Rs. 314-0-2 advanced on the date of the mortgage. This mortgage was duly registered. His case further is that on his mortgage he obtained a decree and brought the properties to sale, and at the time when he brought the properties to sale in execution of his decree, he found that there was a mortgage in favour of the plaintiff, but in the meanwhile the

plaintiff has instituted this suit on his mortgage. In defence thereto, defendant 2 pleaded in para. 4 of the written statement that he obtained a simple mortgage dated 12th May 1927 after assuring himself that there was no kind of encumbrances thereon and obtaining an encumbrance certificate dated 11th May 1927. He further pleaded the equitable mortgage dated 9th February 1927. It may be stated that the title deeds were produced by defendant 2, and it is his case that it was handed over to him on the date of the equitable mortgage or at any rate it may be taken that he was in possession of the title deeds on the date of his simple mortgage of 12th May 1927. There are other defences raised which it is not now material to consider for the point on which I propose to rest my decision. One of the issues in the case is "is defendant 2 entitled to priority, and if so, for what amount?".

2. The learned Subordinate Judge found in favour of defendant 2 on the equitable mortgage and gave priority on that footing to the extent of the amount covered¹ by the equitable mortgage and for the balance amount Rs. 314 which was advanced on the date of the simple mortgage, u/s 76, T.P. Act. The learned District Judge on appeal was of the opinion that the equitable mortgage relied on was inadmissible in evidence on the ground that Ex. 2-a which evidenced the mortgage required registration. He further found that this equitable mortgage could not have come into existence on the date on which it purported to have come into existence, but he nevertheless found that the sum of Rs. 2,000 was really advanced by defendant 2 for discharging the loan in favour of Motichand. At any rate, according to him, the evidence is in favour of the discharge being on the date¹ of 12th May 1927. I accept the said finding. What is the result? It must be taken that the entire sum of Rs. 2,500 must be deemed to have been advanced on 12th May 1927. Under what circumstances did he advance the amount? He wanted to assure himself that there was no prior encumbrance on the property. He insisted on an encumbrance certificate and got it and it disclosed no encumbrance. He secured possession of the title deeds of the property and he got also an assurance from the mortgagor by introducing a recital to that effect in his mortgage deed. The question is, under such circumstances is he not entitled to priority u/s 78, T.P. Act, over that of the plaintiff's mortgage? u/s 78, before defeating a prior mortgagee of his right to recover the money under his mortgage in preference to all mortgages subsequent to the mortgage in his favour, it must be found as a fact that the prior mortgagee was guilty of fraud, misrepresentation or gross neglect. There is no question of fraud and misrepresentation in this case. The only question is whether there was gross neglect on his part. In my opinion, any act or omission on the part of the prior mortgagee which has enabled the mortgagor to deal with the property as if it was not encumbered would be gross neglect within the meaning of the section. I am prepared to accept the definition given by Page J. in *Lloyds Bank, Ltd. Vs. P.E. Guzdar and Co.*, relied on by Mr. Somayya, wherein at p. 884 the learned Judge says thus :

In my opinion, "gross neglect" in Section 78 means and involves failure on the

part of the prior mortgagee to take such reasonable precautions against the risk of a subsequent encumbrancer being deceived as in the circumstances renders it unjust that the earlier mortgage should retain its priority.

3. The question is what is the act or omission which can be attributed to the prior mortgagee which would render his conduct to be grossly negligent? In his mortgage dated 10th March 1927 the mortgagor assured him that there was no alienation in favour of anybody. In token of that assurance there is the following recital "in support hereof I have delivered four title deeds to you," and it is a fact that the title deeds were not delivered on that date. It is no doubt, as pointed out in *Rangaswami Naicken v. Annamalai Mudali* (1908) 31 Mad 7 that the mere failure to secure possession of the title deeds may not be such evidence of gross negligence as would defeat his right to get the money secured on his mortgage in preference to other subsequent mortgagees, but the matter does not rest on the mere failure to secure possession of the title deeds. He has delayed registration of his document until June 1927. The case in 31 Mad 72 is again relied on by Mr. Somayya for the position that even though he may have delayed registration, still the delay coupled with the fact of his not securing the title deeds would not amount to gross negligence as laid down in that decision, but as that decision itself points out, there must not have been any conduct on the part of the mortgagee which would disentitle him to the relief which he can justly claim by reason of his being a prior mortgagee, that is, he must not have been guilty of any act or conduct on his part which would have the effect of inducing a subsequent mortgagee advance money on the faith that it was not encumbered. He must not be himself a party to any act by which the mortgagor would be enabled to deal with the property. Failure to secure the title deeds or the delay in registration are circumstances each standing by itself may not be evidence of negligence, but both circumstances taken together, coupled with the other conduct, may be evidence of gross negligence. Now the plaintiff in his deposition admits what the reason for the delay is. He states thus :

D. 1 asked me to delay the registration saying that he would pay back the amount soon and registration would make the transaction public and bring him to disgrace. He was a merchant and a Union member of Tiruttani. So I agreed to delay.

4. This shows that he allowed the mortgagor to delay registration in order to enable the mortgagor to secure the necessary funds for payment of the amount due to him, that is, to raise the money by borrowing or by selling any of his proper, ties. Under such circumstances, allowing the mortgagor to retain the title deeds would be tantamount to allowing the mortgagor to deal with the property in order to enable him to raise and pay the money due under the mortgage. It seems to me, therefore, the plaintiff was guilty of gross negligence within the meaning of Section 78, T.P. Act. Mr. Somayya strenuously argued that the plea based on Section 78, T.P. Act, was not raised in the written statement, and it is not open to the Courts to go into that plea, and his client was put to considerable

inconvenience thereby. I quite admit that the plea should have been taken in the written statement, but there were facts alleged in the written statement on which such a plea can be found, because para. 4 of the written statement distinctly states that the simple mortgage was taken on the faith of an assurance given to the mortgagee that there was no encumbrance and after defendant 2 satisfied himself by production of the encumbrance certificate that there was no mortgage. Further, one of the Issues in the case is, as I have already stated, "is defendant 2 entitled to priority and if so to what amount?". In the first Court, at any rate, to the extent of Rupees 314-0-2 the plea based on Section 78, T.P. Act, was allowed to be raised and gone into by the first Court. Therefore if the plea to the extent of Rs. 314-0-2 was allowed to be gone into, I do not see that any more facts are necessary for the plea in regard to the rest of the amount secured by the document. In the view the first Court took it was not necessary to base its decision on Section 78 in regard to the amount covered by the alleged equitable mortgage, though I must say that the first Court was even prepared to find in regard to the entire amount even on Section 78, T.P. Act. The learned Judge observes thus in para. 21:

Defendant 2 had taken all reasonable precautions before Ex. 5, and had insisted on an encumbrance certificate up to date. It was the plaintiff's negligence in not getting Ex. A registered forthwith and the absence of mention of his mortgage in the encumbrance certificate Ex. 4-b that induced defendant 2 to continue his loan u/s 2 and to advance a new loan of Rs. 314-0-2.

5. Now that the learned District Judge was not prepared to uphold the equitable mortgage and only finds that an entire sum of Rs. 2,500 must have been advanced on the date of Ex. 5, there is no reason for disallowing the priority u/s 78 in respect of the entire amount on the facts as found. I therefore set aside his decree. Defendant 2 is hereby declared entitled to priority in respect of the sum of Rupees 2,938-13-4 allowed by the first Court. Therefore, the decree of the learned District Judge will be varied by allowing priority to defendant 2 in respect of this amount. In regard to the question of costs, I think defendant 2 is entirely to blame in not specifically raising this plea in the written statement and he left it to the Courts to give him the relief on the facts deposed to by the plaintiff. In the circumstances I direct each party to bear his own costs throughout. The memorandum of objections is dismissed but without costs. (Leave to appeal refused).