

(1934) 01 MAD CK 0022
In the Madras High Court

Dara Sivarao

APPELLANT

Vs

Kola Subbarao

RESPONDENT

Date of Decision : 26-01-1934

Acts Referred:

Evidence Act, 1872 — Section 115

Citation : AIR 1934 Mad 302 : (1934) 39 LW 431

Hon'ble Judges : Sundaram Chetty, J

Bench : Division Bench

Judgement

Sundaram Chetty, J.—This is a Letters Patent Appeal against the judgment of our learned brother Jackson, J. The appeal arises out of a suit

filed by the plaintiff who is the assignee of a mortgage held by defendant 4, for the recovery of a sum of money, by enforcing the mortgage.

Defendant 1 was the mortgagor. Two items of properties are comprised in the mortgage. Defendant 3 happened to be a subsequent purchaser of

item 2 for a sum of Rs. 725. It is clear from the findings of fact arrived at by the first appellate Court, that this transaction of sale by defendant 1 to

defendant 3 was brought about with full knowledge and concurrence of the mortgagee (defendant 4) who was more or less instrumental in bringing

about this purchase and who derived the benefit of this purchase, inasmuch as he credited the purchase money, viz., Rs. 725 towards the debt

(between Rupees 800 and Rs. 900) due from defendant 1. This amount covers the debt due on the mortgage also. However, no endorsement of

payment was made on the mortgage deed. It seems that, this-sort of arrangement was entered into for some purpose known to defendants 1 and 4

alone. Defendant 3 was kept in complete ignorance of the existence of the mortgage in favour of defendant 4 over the property (item 2), and it is

also clear that he would not have paid the full consideration for Rs. 725 for item 2 if he had the least idea of its being subject to an encumbrance in favour of defendant 4.

2. The evidence shows that it was defendant 4 who advanced a sum of Rs. 25 to the vendor (defendant 1) to meet the expenses of stamp and registration for the sale deed. There is no doubt that defendant 4 took an active part in bringing about this sale. It may even be said, that by his silence or acquiescence he led defendant 3 to believe that he was purchasing an unencumbered property. It is argued that defendant 4 was not under a duty to disclose his mortgage, and therefore his silence in this respect should not be construed to be such as would create an estoppel u/s 115, Evidence Act. That section says that an estoppel can be created by declaration, act or omission, provided the effect thereof was to induce another person to believe a thing to be true and to act upon such belief. Defendant 3 was certainly led to go in for this bargain by reason of defendant 4's conduct, not to speak of defendant 1's conduct also. It follows therefore that defendant 4 is estopped from setting up his mortgage on item 2, to the prejudice of the purchaser (defendant 3).

3. The next question is, whether the estoppel which could be pleaded by defendant 3 as against defendant 4 could also be operative as against the plaintiff, who is an assignee of the mortgage. We may even assume that he was a bona fide assignee for value. The question then is whether the plaintiff is a representative of defendant 4 within the meaning of Section 115, Evidence Act. If so, he is also estopped, from enforcing the mortgage against item 2. An attempt is made on behalf of the appellant to limit the meaning of the word "representative" in the aforesaid section to a gratuitous transferee or volunteer and to a subsequent transferee for value with notice of the circumstances creating an estoppel. We find that there is no basis for such a restricted understanding of the word "representative." The plaintiff's position is nothing more than that of a derivative owner. He is certainly a person claiming under defendant 4. The fact that he was not aware of the circumstances creating an estoppel against defendant 4, would not avail him. There is the authority of the Privy Council in more decisions than one. In *Poreshnath Mukerji v. Anathnath Deb* (1883) 9 Cal.

265, the principle laid down is that a purchase by a mortgagee in execution of

the mortgage-decree does not place him in a better position as regards the estoppel which could be asserted against the mortgagor himself. That is not the case of a mere volunteer or gratuitous transferee, but a bona fide purchaser for value. The same view has been expressed in a later decision of the Privy Council reported in *Mahomed Mozaffer Hussain v. Kishori Mohun Roy* (1895) 22 Cal. 909. The estoppel therein considered was held to be available even as against a purchaser of the right, title and interest of the person against whom the estoppel could be asserted. The same view is also referred to in *Kalidas Chaudhuri v. Prasanna Kumar* AIR 1920 Cal. 354. It seems to us that the present case is one of estoppel and we need not consider this case from the standpoint of equities. It is not quite correct to say that any equity which could be set up against the assignor (defendant 4) is also sought to be enforced against the assignee. On the other hand, the question of estoppel is one coming within the purview of Section 115, Evidence Act, and therefore the plaintiff as the representative of defendant 4 is equally estopped. In the result, this Letters Patent Appeal is dismissed with costs.