(1934) 01 MAD CK 0007

In the Madras High Court

Dara Sivarao APPELLANT

Vs

Kola Subbarao RESPONDENT

Date of Decision : 16-01-1934

Acts Referred:
Evidence Act, 1872 — Section 115

Citation : (1934) 66 MLJ 563

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 the 4th defendant, for the recovery of a sum of money, by enforcing the mortgage.

The 1st defendant was the mortgagor. Two items of properties are comprised in the mortgage. The 3rd defendant 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

the 1st defendant to the 3rd defendant was brought about with the full knowledge and concurrence of the mortgagee (4th defendant) 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 Rs. 800 and Rs. 900) due from the 1st defendant. 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. The 3rd defendant was kept in complete ignorance of the existence of the mortgage in favour of the 4th defendant 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 the 4th defendant. The evidence shows that it was the 4th defendant who

advanced a sum of Rs. 25 to the vendor (1st defendant) to meet the expenses of stamp and registration for the sale deed. There is no doubt that

the 4th defendant took an active part in bringing about this sale. It may even be said, that by his silence or acquiescence, he led the 3rd defendant

to believe that he was purchasing an unencumbered property. It is argued that the 4th defendant 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 of the 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. The 3rd defendant was certainly led to go in for this bargain by reason of the 4th defendant''s conduct, not to

speak of the 1st defendant''s conduct also. It follows, therefore, that the 4th defendant is estopped from setting up his mortgage on the second

item, to the prejudice of the purchaser (3rd defendant).

2. The next question is, whether the estoppel which could be pleaded by the 3rd defendant as against the 4th defendant could also be operative as

against the plaintiff, who is an assignee of the mortgagee. We may even assume that he was a bona fide assignee for value. The question then is,

whether the plaintiff is a representative of the 4th defendant within the meaning of Section 115 of the Evidence Act. If so, he is also estopped from

enforcing the mortgage against the second item. 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 the 4th defendant. The fact that he was not aware of the circumstances

creating an estoppel against the 4th defendant, would not avail him. There is the authority of the Privy Council in more decisions than one. In

(1882) L.R. 9 I.A. 147 (Privy Council) 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 of a bona fide purchaser for value. The same view has been expressed in a later decision of the Privy

Council reported in (1895) L.R. 22 I.A. 129 (Privy Council) . 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

Chqudhuri v. Prasanna Kumar Das ILR (1919)Cal. 446 . 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 (4th defendant) 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 of the

Evidence Act, and therefore, the plaintiff as the representative of the 4th defendant is equally estopped.

3. In the result, this Letters Patent Appeal is dismissed with costs.

