

(1911) 09 BOM CK 0005

In the Bombay High Court

Case No : Second Appeal No. 19 of 1910

Hillaya Subbaya Hegde

APPELLANT

Vs

Narayanappa Timmaya

RESPONDENT

Date of Decision : 12-09-1911

Acts Referred:

Citation : (1911) 13 BOMLR 1200 : 12 Ind. Cas. 913

Hon'ble Judges : Russell, J;Chandavarkar, J

Bench : Division Bench

Judgement

Chandavarkar, J.—The facts of the case, as found by the Court below, are shortly these. The property belonged to one Ganpaya who died in the year 1878, leaving him surviving a widow by name Devamma, and a widowed sister-in-law. These two widows on the 24th of September 1878 sold the property to one Ganpaya Adenaya. Ganpaya Adenaya in the year 1892 mortgaged it to the respondent-plaintiff's uncle Devappa. Ganpaya Adenaya died in 1901 and in the year 1897 Devamma died. The respondent now sues to foreclose; the appellant resists the claim on the ground that Devamma had no right to mortgage the property beyond her life-time, and that he, as the reversionary heir of her husband, is entitled to it, free of the mortgage.

2. The District Judge, without finding whether the appellant is reversionary heir, has allowed the respondent's claim. He has held that Ganpaya Adenaya, the respondent's mortgagor, became owner of the property under the sale from Devamma. That view of the law cannot be accepted as sound in the absence of a finding that the sale by Devamma, who had a Hindu widow's estate, was for necessary purposes, and was, therefore, binding on her husband's reversioners, and that the appellant was the reversionary heir he claimed to be.

3. If, therefore, the case had rested solely upon the considerations above dealt with, the decree of the District Judge would have had to be reversed. But the District Judge has also recorded another finding which is decisive of the case against the appellant. The suit was brought by the respondent for foreclosure

against defendants 1 and 2, his mortgagors. The District Judge has found as a fact upon the evidence that the appellant (defendant No. 3) revived his "old claim" against Ganpaya Adenaya and "contrived to slip into possession" of this property "by inducing Ganpaya's sons, defendants 1 and 2 to favour his claim". At the conclusion of his judgment that finding is repeated by the Judge in these words : "Defendant 3 may or may not be the reversionary heir of Ganpaya, but having failed to take possession from Ganpaya Adenaya of the property now in dispute for nearly twenty years, he can derive no advantage from getting fraudulent possession through defendants 1 and 2 or their tenants".

4. This finding, which, being one of fact, has not been and indeed could not be questioned by the appellant in his memorandum of second appeal to this Court, amounts to this, that he obtained possession of this property by colluding either with defendants 1 and 2, who are the heirs of the respondent's mortgagor deceased, or with their tenants. This fraud on the part of the appellant is sufficient in law to deprive him of the right to be heard in defense to this suit, that he is entitled to the property as reversionary heir of Devamma's husband. The law is that no man shall be allowed to profit by his own fraud and it would be a violation of that sound maxim if we were to allow the appellant to succeed in this suit after he has obtained possession by means of fraud and collusion.

5. No doubt, the true owner of property is entitled to retain possession, even though he has obtained it from a trespasser by force or other unlawful means: *Lillu bin Raghushet v. Annaji Parashram* ILR (1881) 5 Bom. 387 and *Bandu v. Naba* ILR (1890) 15 Bom. 238. But that is so only where the true owner gets into possession without bringing himself within the law of estoppel. Here the facts raise an estoppel as against the appellant whose ownership is denied and has to be proved. As between a mortgagor and his mortgagee neither can deny the title of the other for the purposes of the mortgage. As is said in the text-books, a mortgagor cannot derogate from his grant so as to defeat his mortgagee's title, nor can the mortgagee deny the title of his mortgagor to mortgage the property. Therefore defendants Nos. 1 and 2, having been in possession of the property as mortgagors of the respondent (plaintiff), were bound to hold it in that capacity. If they were threatened or obstructed by the appellant claiming as the true owner, they ought to have given him (plaintiff) notice of the threat or obstruction so as to enable him to defend his rights as a mortgagee. But according to the finding of the learned District Judge, instead of doing that, they colluded with the appellant and that collusion was brought about by the appellant himself. It is by means of his fraud that appellant got into possession with the help of defendants 1 and 2, the heirs of the mortgagor. Under these circumstances the rule of estoppel which applied to them extends to the appellant also: *Pasupativ. Narayana* ILR (1989) Mad. 335. On this ground and this ground alone, the decree must be confirmed, without prejudice to the right, if any, of defendant No. 3 to recover possession of this property by a separate suit. We must, therefore, confirm the decree of the Court below with costs.