

(1943) 10 MAD CK 0023
In the Madras High Court

Jadam Jampur Bai alias Venkamma

APPELLANT

Vs

Jinki Siddappa and Another

RESPONDENT

Date of Decision : 14-10-1943

Acts Referred:

Citation : AIR 1944 Mad 237 : (1944) 57 LW 42

Hon'ble Judges : Horwill, J

Bench : Division Bench

Judgement

Horwill, J.—The suit out of which this appeal arises was one for redemption. Both the Courts below have held that the plaintiff was entitled to redeem. Defendant 1 opposed the suit on many grounds; but those with which we are concerned are: (1) that the transaction entered into between the plaintiff and defendant 1 was not a mortgage but a sale; (2) that in any event the matter is governed so far as a large portion of the hypotheca was concerned by Section 41, T. P. Act, and otherwise by estoppel, the plaintiff having held out defendant 1 as the ostensible owner of the property and allowed various portions of the property to be alienated, and (3) that the plaintiff is precluded from setting up his claim because he failed to put them forward in O.S. No. 604. I need not repeat the arguments of the learned District Munsif and the learned District Judge in their judgments. Exhibit A, the document in question, has been set out in full. The document is headed "conditional sale" and not "sale," from which one would understand a document which was to operate as a sale only upon a certain contingency. We find that the body of the document confirms this interpretation. The plaintiff said in that document:

If we do not pay your amount by the due date, (viz., within five years), we agree to this document being treated as a sale deed.

It appears from this that the conveyance was not a sale at all, but was to operate as a sale only after a period of five years and then only if the plaintiff had not paid the amount advanced under the document. The "recital,

After the due date you and your heirs will have absolute powers in respect of the property. We and your heirs will not have any rights

would merely amount to a clog on the equity [of redemption].

2. There are at least three reasons why the appellant cannot succeed on his plea of estoppel. The nature of the estoppel-except with regard to the one alienation as to which there is no dispute in this Court - is that the alienees of various items of the hypothecum perused Ex. A and formed a bona fide belief that under it defendant 1 acquired an absolute title to land. In the first place, the alienees with which we are concerned did not enter the witness box; and so we do not know that they looked into Ex. A. In the second place, if they did so and misunderstood it, they must bear the consequences, the principle of caveat emptor applying. The learned advocate for the appellant relied on an observation of Srinivasa Ayyangar J. in *Sethumadhava Ayyar Vs. Bacha Bibi and Others*, The case with which the learned Judge was dealing there was one in which there were two documents which had to be read together. One was an absolute conveyance by sale and the other was a contract to reconvey after a certain date if a certain price were paid. Certain purchasers of parts of the hypothecum in this mortgage by conditional sale saw the document whereby the land purported to be conveyed absolutely, but had no reason to suspect that there was another document in existence which, when read with the one they had seen, would show that the transaction was not an absolute sale but a mortgage by conditional sale. Srinivasa Ayyangar J. went further than was necessary, however, and seemed to be of opinion that even if they had seen the other document and read the two together, they were entitled to be protected by the provisions of Section 41, because it was possible for a layman reading those two documents to believe that there was an absolute conveyance. With respect, I find it difficult to agree with this obiter dictum. It is, however, unnecessary to expressly dissent from this dictum in view of the fact that there are two other reasons why Section 41, T. P. Act, will not apply. In this connexion, it was argued the burden lay upon the plaintiff u/s 41 T. P. Act, of showing that the transferees were not misled by Ex. A; but I do not find any reason to think that Section 41 throws such a burden on the true owner of the property. Reliance has been placed upon *Rajah of Karvetnagar v. Saravana Pillai* AIR 1917 Mad. 775, where a passage from *Ram Coomar Koondoo v. John and Maria Macqueen* (1973) 11 Beng. L.R. 46, is quoted. The relevant passage is:

It is a principle of natural equity, which must be universally applicable, that where one man allows another to hold himself out as the owner of an estate, and a third person purchases it, for value from the apparent owner in the belief that he is the real owner the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing, either that he had direct notice, or something which amounts to constructive notice, of the real title or that there existed circumstances which ought to have put him upon an enquiry that, if prosecuted,

would have led to a discovery of it.

That passage itself indicates that the alienee must show in the first instance that the owner has held out some other person as the ostensible owner of the property. It is only then that he has to show that the alienee had some notice of his true title. Finally, on this point of estoppel, the estoppel is between the true owner and the alienee in good faith, not between the parties to the mortgage. Defendant 1 cannot invoke Section 41, T. P. Act; because when he made those alienations he knew or should have known that he had no right to make them.

3. O.S. No. 604 of 1941 was a suit for rent brought on Ex. A and that suit was unopposed and was decreed ex parte. On the allegations in the plaint the only points that could have been in issue in the suit were whether defendant 1 was entitled to rent and whether, if the rent were not paid, he was entitled to possession. There can be no doubt that under Ex. A- whether it be construed as a deed of sale or as a usufructuary mortgage-defendant 1 was entitled to rent and that if rent was not paid he was entitled to possession. So the decision in that suit could not have operated as res judicata on the question whether Ex. A was an outright sale or a usufructuary mortgage. This second appeal fails and is dismissed with costs.