

(1928) 10 MAD CK 0032
In the Madras High Court

(Marella) Akshayalingam and Another	APPELLANT
Vs	
(Donepudi) Ramayya and Another	RESPONDENT

Date of Decision : 15-10-1928

Acts Referred:

Citation : AIR 1929 Mad 426

Hon'ble Judges : Odgers, J

Bench : Division Bench

Judgement

Odgers, J.—This is an appeal from the decree of the learned District Judge of Kistna at Masulipatam wherein he reversed the decree of the Subordinate Judge. The suit was by the plaintiffs as mortgagees to recover a certain sum due on a mortgage by way of sale of the mortgage properties. The mortgage was executed in their favour (but as they were minors at the time they were represented by their mother as guardian) by defendant 2 and the late Kondayya, the deceased father of defendant 1 and husband of defendant 2. The plaintiffs now file the suit as mortgagees and the question involved is a certain site in the village of Lakshmipuram which is included in the mortgage-deed. The defendants-mortgagors contended that this site never belonged to themselves or the late Kondayya, but belongs to the family of the plaintiffs themselves and was inserted in the mortgage-deed with the view of perpetrating a fraud on the registration law.

2. The finding of the Subordinate Judge is that this is the fact and that this site was included in the mortgage-deed Ex. A with the object of getting the document registered in Challapalli which is only two miles from the residence of the parties in Devarakota. This is said to have been done to avoid the trouble of registering in Voyyur which is 18 miles from Devarakota. The learned Subordinate Judge sets out the authorities on the subject, finds that Ex. A is a mortgage in renewal of a prior mortgage-deed and comes to the conclusion that there was no intention that the title in this plot should pass to the mortgagee or on the part of the late Kondayya to create a title in himself. The plaintiffs set up a case of a gift

of this plot to themselves prior to the mortgage. This is disbelieved and the Subordinate Judge finds that this site of 10 yards was in fact got up for the occasion " and was the property of the mortgagees themselves. He points out that this site is added on the third sheet, that in the schedule attached to the plaint the site has been omitted and it was not until the day of argument that the plaintiffs presented a petition for amending the plaint by the inclusion of this site. On these facts he found consciousness on the part of the mortgagees that title to the site was not in the mortgagors, that it was never intended to pass to the mortgagees and was included for the purpose of registration in the Challapalli Sub-Registry. He, therefore, found the document void and dismissed the suit.

3. It should be added that the plaintiffs' mother who was the guardian during minority was not called and it was not until the case came on for argument on 29th June 1923 that a petition was presented to examine her as a witness. This was rejected by the learned Subordinate Judge. When the case came before the District Judge he agreed with the Subordinate Judge that the site was actually the property of the mortgagees and was included in order to secure registration in Challapalli. He, however, says that it is necessary to find collusion between the mortgagors and the mortgagees and that to that end it is necessary that the mortgagors-defendants should establish that the plaintiffs' mother herself was personally aware of the inclusion of the site in the deed and why it was included. The learned District Judge felt there was " a moderately strong presumption " that she possessed this knowledge and considering that it was to the benefit of both parties examined the plaintiffs' mother under Order 41, Rule 27.

4. The question is whether the learned-District Judge is right in saying that the necessity of collusion was not properly apprehended by the parties at the original hearing and that the reasoning contained in the judgment of the Subordinate Judge was inconclusive and also whether he is right in his opinion that the burden is on the mortgagors under the circumstances of this case and finally whether he is right in refusing to draw the conclusion after hearing the evidence of the plaintiff's mother that there was no collusion between the mortgagors and mortgagees. A point has been taken that the learned District Judge had no right to call the plaintiffs' mother suo motu and certain cases were cited to that effect. However, I think it may fairly be said that the learned Judge acted under Order 41, Rule 27 (a), and felt that the evidence of the plaintiffs' mother was necessary in order to enable him to pronounce a satisfactory judgment : see *Andiappa Pillai v. Muthukumara Thevan* [1912] 36 Mad. 477.

5. The plaintiffs' mother in her evidence which as the learned Judge states must be accepted with great reserve, nevertheless says quite plainly that Ramayya who died about 1919 had the mortgage-deed written; he attended to her affairs (during his lifetime; in a partition in the family Ramayya represented these minors; he acted in the mortgage on her behalf and he (Ramayya) told the witness that he got the mortgage-deed executed as it would make the debts safer, then he took the prior mortgage-deed and had the renewal written in

accordance with it. The witness says she does not know wherefrom he got the description of the property. Nor does she know if he went to the Registrar's Office to identify the mortgagors.

6. Under these circumstances the question is how the law is to be applied. The law is quite clear and we have two leading authorities both of the Privy Council. The first is *Harendra Lal Roy v. Haridasi Debi* AIR 1914 P.C. 67 which was a case of insertion in the mortgage-deed of non-existing property. Their Lordships say that the defendants (i.e.), mortgagors having proved that the property purported to be included in the mortgage did not exist and that the mortgagor had never any interest in it had proved all that was necessary to throw upon the plaintiff i.e., the mortgagee the burden of showing that the entry of this parcel of land was not a fictitious entry. Taking all these matters into consideration in that case, their Lordships came to the conclusion that the entry was fictitious to the knowledge of the parties. This case is referred to and followed by the Privy Council again in *Biswanath Prasad v. Chandra Narayan Chowdhury* AIR 1921 P.C. 8 where the property was in existence but the mortgagor had no interest in it and the parties to the mortgage never intended that it should form part of the security. It was a mere device to avoid the Registration Act. In *Venkata Lakshmikantaraju v. Venkata Jagannatha* AIR 1924 Mad. 281 a decision of Hughes, J., and myself, I set out the cases already referred to and also *Pahladilal v. Mt. Laraiti* [1919] 41 All. 22 and stated that it must be shown in a case of this kind that the parties had colluded. There I found there was no evidence of participation by the mortgagee either as regards the insertion of the item in the deed or of intention that the item should not form part of the security.

7. In this case, it seems to me that we must take it that Ramayya acted for the widow as guardian of the minors in this mortgage transaction and that this case is very much stronger than either of the Privy Council cases in that the property has been found by both the Courts to belong to the mortgagees themselves. Therefore no question of knowledge as to whether it was the property of the mortgagors or that of a stranger or whether it had any existence or not in fact comes into play. Ramayya must, it seems to me, have known that this property was inserted in this mortgage-deed as the widow says in her evidence he had the deed in suit copied from the prior mortgage-deed. The whole of the circumstances pointed out by the learned Subordinate Judge seems to me to show beyond reasonable doubt that this item was included in the mortgage-deed with the object of obtaining registration in Challapalli and that it was inserted with the knowledge of the mortgagees or their agents. It is quite clear that Ramayya's knowledge must be imputed to the widow even if her denial can be accepted that she knew nothing about the inclusion of this plot. A notice to an agent is of course notice to the principal since otherwise notice might be avoided in every case by employing agents. The learned District Judge came to the conclusion that some one acting on behalf of the mortgagees consented to the inclusion of the property in question. But as stated he did not feel compelled to draw an inference against them as there was no evidence that the guardian was

personally privy to the fraud. This fraud is of such a clear character as I pointed out above that it seems to me impossible to avoid the conclusion that at least Ramayya if not the widow personally knew all about it, and the onus being in such a state of circumstances on the mortgagees as pointed out by their Lordships of the Privy Council in *Harendra Lal Roy v. Haridasi Debi*, and not on the mortgagors as the learned District Judge thought, I can come to no other conclusion than that they have not discharged this onus. In the result the appeal must be allowed with costs here and in the lower appellate Court.