

(1926) 01 MAD CK 0031
In the Madras High Court

Narayanaswami Aiyar

APPELLANT

Vs

Venkatarama Aiyar and Another

RESPONDENT

Date of Decision : 19-01-1926

Acts Referred:

Citation : AIR 1926 Mad 808 : 95 Ind. Cas. 264 : (1926) 23 LW 749 : (1926) 50 MLJ 511

Judgement

1. This is an appeal from an order of remand. Plaintiff is the appellant. He is the assignee of a mortgage from the 8th defendant. The 1st

defendant's deceased husband mortgaged the suit properties to the 8th defendant for a sum of Rs. 550 under Ex. A dated the 23rd of July, 1909.

Later on, the 1st defendant who had become entitled to the properties sold them to the 4th defendant under Ex. D subject to the payment of the

suit mortgage, the consideration for which was mentioned as Rs. 550. This appeal arises out of the suit instituted by the plaintiff, the assignee, for

the enforcement of the mortgage by sale of the mortgaged properties.

2. The 4th defendant contended that the mortgage was not supported by consideration. The District Munsif held that he was estopped from

questioning the consideration for Ex. A,

3. The learned Subordinate Judge on appeal held that there was no estoppel and remanded the suit for trying the question of consideration.

4. The contesting respondent has taken a preliminary objection that no appeal lies against the order of remand, inasmuch as the decision of the

case by the District Munsif was not based upon a "preliminary point. It is true, as pointed out by him, that the District Munsif has referred to the

evidence regarding consideration in paragraph 10 of his judgment, but it is clear

from the records and this is pointed out by the Subordinate Judge also that the District Munsif did not give an opportunity to the 4th defendant's vakil to cross-examine the witnesses on the question of consideration or to tender any evidence in support of his contention, obviously on the ground that he was estopped from impeaching Ex. A. In these circumstances, we are satisfied that the District Munsif rested his decision on the "preliminary point" of estoppel and thus disallowed evidence on the main issue. An appeal, therefore, lies against the order of remand.

5. The main question for decision is whether the 4th defendant is estopped from questioning the consideration for Ex. A. At the very outset it may be mentioned that neither the first defendant nor the 8th defendant denies the consideration for the suit mortgage. It is argued by the learned vakil for the appellant that the 1st defendant who occupies the position of the mortgagor is estopped from raising the question of consideration and that, since the 4th defendant claims the suit properties through her as his vendor, the plea of estoppel operates equally against him. In *Bickerton v.*

Walker (1885) 31 ChD 151, it was held that "where a deed of conveyance whether by way of mortgage or otherwise contains within itself a receipt for consideration money, or has a receipt indorsed upon it, the Vendor or mortgagor is estopped as between himself and a person who

innocently acts upon the faith of such a representation from averring that a less sum or no sum at all has been received by him." (See *Halsbury*, Vol.

XIII, p. 371, Paragraph 523). As pointed out by Fry, L.J., in that decision, so in this case the mortgagor allowed the mortgagee (8th defendant) to

have possession of the deed containing the statement that Rs. 550 was the consideration for the mortgage and the plaintiff "must be taken to have

advanced his money on the faith of the production of the mortgage deed." The mortgagor being thus clearly estopped from raising the question of

consideration for Ex. A. we think that the vendee, the 4th defendant, who claims the property through the mortgagor is also equally estopped from

raising the same question. In *Shailesh Chandra v. Bechai* 19 MLJ 682 (PC) it was held that a transferee of a portion of mortgaged property is not

competent to avoid a deed on the ground of undue influence exercised on the mortgagor when the mortgagor himself did not at any time avoid the

contract, nor did he seek to do so in the suit brought against him and the

transferee on the deed.

6. On behalf of the respondent Mr. Krishnaswami Aiyar relies on a decision in *Izzatunnissa Begum v. Partab Singh* 19 MLJ 682 (PC), in support

of the argument that the plea of estoppel does not operate against the 4th defendant. In that case it was held that the owner of properties sold

subject to incumbrances which were afterwards declared void would not be entitled to claim from the auction-purchaser the incumbrance amounts.

This decision has absolutely no bearing on the question raised before us. In reply to the plea that the auction-purchaser was estopped from

contending that he was not bound to pay the incumbrance moneys, their Lordships pointed out, : "There is nothing in the circumstances of the case

to raise an estoppel against the appellant," meaning thereby that no representations affecting anybody's conduct could be supposed to have been

made by the auction-purchaser. In the present case the 4th defendant is estopped not by any representations or admission which he has himself

made but by representations or admission made by the mortgagor (now represented by the 1st defendant) through whom he claims title to the

mortgaged properties.

7. In this view, it follows that the 4th defendant is estopped from raising the question of consideration and, as all the other issues have been decided

in favour of the plaintiff, we think the plaintiff is entitled to get the decree passed in his favour by the District Munsif for the sale of the B Schedule

properties. Setting aside the order of the Lower Court We therefore restore the decree of the District Munsif with costs here and in the Court

below.