

**(1891) 11 MAD CK 0012**  
**In the Madras High Court**

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|-------------------------------------|----|------------|
| Sah Maun Mull and Another           |    | APPELLANT  |
|                                     | Vs |            |
| The Madras Building Company Limited |    | RESPONDENT |

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**Date of Decision :** 24-11-1891

**Acts Referred:**

Transfer of Property Act, 1882 — Section 78

**Citation :** (1892) 2 MLJ 95

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**Judgement**

1. It is an admitted fact that the three principal title-deeds relating to the property in question in this suit, which should have been in the possession of the late 2nd defendant as mortgagee under a deed of mortgage from Mrs. Annie Smith, of the 5th December 1879, were in September 1883 in the possession of the mortgagor, who was thereby enabled to obtain a loan of Rs. 10,000 from the plaintiff company on executing to them a mortgage of the property in question dated 15th October 1883, and subsequently to obtain a further sum of Rs. 500 by way of further charge on the same property. The explanation which 2nd defendant gave of the title-deeds being out of his possession was that he was in possession of them in 1878, having obtained them on the occasion of taking a prior mortgage from Mrs. Smith, but gave them up to her in that year to enable her to obtain a new Collector's certificate in her name, that such new Collector's certificate was issued in May 1878 and handed to him but he did not receive back the title-deeds from Mrs. Smith and on asking her for them was told that they were retained by the Collector, with which answer, he was satisfied and took no further steps to obtain the title-deeds. We understand from the judgment that the learned judge who tried the case did not believe this explanation and we see no reason whatever to differ from him. It is possible that the first part of the story is true and that the title-

deeds were given up by the 2nd defendant to Mrs. Smith to enable her to get the new Collector's certificate, but we agree with the learned judge

that it is incredible that 2nd defendant, a sowcar of experience, who, on his own admission had had a good deal to do with mortgages, and who is

well known in this Court as having been concerned in much litigation connected with mortgage transactions, could have believed that it was the

practice for the Collector to retain possession of title-deeds handed to him on the occasion of a new certificate being applied for--not to retain

them temporarily but to keep them altogether--and that he should have believed this extraordinary statement merely on the word of Mrs. Smith and

should never have made enquiries as to its truth at the Collector's office. This part of the 2nd defendant's story rests only upon the evidence of

himself and of his relative and agent Hunsraj and we think the learned judge was amply justified in rejecting it as incredible.

2. The case is therefore one of a first mortgagee, who allows the title-deeds nearly 4 years after his mortgage to be in the possession of the

mortgagor, and gives no reasonable explanation of these being so in her possession, and the question is whether he is on that account to be

postponed to the 2nd mortgagee, the plaintiff company. The law under which this question has to be decided is unquestionably Section 78 of the

Transfer of Property Act, for the inducing the plaintiff company to advance money on the security of the property in question took place after the

Act came into force. That the allowing the title-deeds to be in the hands or at the disposal of the mortgagee nearly 4 years after the date of his

mortgage was gross neglect on the part of 2nd defendant in the ordinary meaning of the words can hardly be doubted. We think it would be so

even if his explanation were believed, and a fortiori when it is not believed. But it is argued that the words "gross neglect" in Section 78 of the Act

must be understood in the limited sense in which they are used in the English decisions on the subject, viz., as meaning such gross neglect as is

evidence of fraud or complicity in fraud. No doubt the tendency of the English decisions and especially since the case of the Northern Counties of

England Fire Insurance Company v. Whipp L. R. 26 Ch. D 482, where the previous cases were classified and summarised, has been to refuse to

postpone the owner of the prior legal estate to a subsequent equitable incumbrancer merely on the ground of gross negligence unaccompanied by

any element of fraud. We are not prepared however to hold that the words "gross neglect" in Section 78 of the Transfer of Property Act must

necessarily be read by the light of the English decisions. On the contrary the language of the section, "where through the fraud, misrepresentation,

or gross neglect, &c." seems to us to indicate an intention to make gross neglect of itself and apart from fraud a reason for postponement of the

prior mortgagee and this view is strengthened by the use of the word "misrepresentation," which is not necessarily fraudulent misrepresentation. The

framers of the Indian Act must have considered the English decisions prior to the Northern &c. Company v. Whipp L. R, 26 Oh. D 482, and if

they had wished to limit the application, of the words "gross neglect" to cases, where there was an element of fraud, could have done so by

appropriate words. And it is in our opinion strictly in accordance with the principles of equity that a person who by his gross neglect enables

another to commit a fraud shall suffer for that fraud. We should therefore hold that u/s 78 of the Transfer of "Property Act, apart from the question

of fraud, 2nd defendant, having been guilty of gross neglect, in allowing the title-deeds to be out of his possession and thereby allowing the plaintiff

company to be induced to advance money on the security of the mortgaged property, should be postponed to the plaintiffs mortgage.

3. It may be noted that this was the view of the law taken by the Madras High Court before the passing of the Transfer of Property Act in the case

reported in 4 M. H. C. R 369, Somasundara Tam-biran v. Sakharai Pattern In that case, after quoting some Sudder Court decisions on the

subject, and commenting on the English cases and in particular the then recent case of Thorpe v. Holdsworth 38 L. J Ch. 194, the learned judges

quoting the words from that case, "The mere possession of the title-deeds by a 2nd mortgagee, though a purchaser for value without notice, will

not give him priority. There must be some act or default on the part of 1st mortgagee to have this effect," observe, "We consider this to be a just

and reasonable rule to be applied to this country. The non-possession of the title-deeds by the 1st mortgagee is a circumstance which certainly

calls for explanation on his part, but it may be explained; and if he can satisfy the court that the absence of the title-deeds was reasonably

accounted for to him at the time when he obtained his mortgage, or that he was subsequently induced to part with them upon such grounds and

under such circumstances as to exonerate him from any serious imputation of negligence, he ought not lose his priority because the mortgagor may afterwards have dishonestly handed over the title-deeds to a 2nd mortgagee." The cases upon Section 78 of the Transfer of Property Act, reported in I. L. R 12 M 424, *The Madras Hindu Union Bank v. C. Venkatarangiah* and I. L.R 12 M 429, *Damodara v. Somasundara*, adopt the same principle though they are professedly based upon the English decisions.

4. But even on the principle of the English decisions we agree with the learned judge that 2nd defendant should be postponed. The case of *Hewitt*

*v. Loosemore* 9 Hare, 449 quoted in the judgment and which has not been dissented from in later cases is directly in point. There it was held that

the court will not impute fraud or gross and wilful negligence to the prior mortgagee if he has bona fide inquired for the title-deeds and a reasonable

excuse has been given for their non-delivery but otherwise will impute fraud or gross and wilful negligence. Here on the finding of the learned judge

in which we concur there was no bona fide inquiry for the title-deeds or reasonable excuse for their non-production and the court therefore will

impute fraud or gross and wilful negligence which is evidence of fraud to 2nd defendant and will therefore postpone him to plaintiff. It is argued for

appellants that the circumstance of the case negative fraud on the part of the 2nd defendant, for it could not have been to his advantage that the

title-deeds should be out of his possession. As to this it must be said that we have very little evidence as to the exact nature of the pecuniary

transactions between 2nd defendant and Mrs. Smith; and that little only the statements of himself and his agent. He admitted that he had other

money dealings with her besides the mortgage in question. We know from the documents that he had advanced money on mortgage of this very

property to former owners of it and joined them in conveying it to Mrs. Smith in January 1878. According to his own story, he immediately

obtained a mortgage of the property from Mrs. Smith in February 1.878. Then he takes the mortgage in December 1879, and subsequently sues

Mrs. Smith on this mortgage and withdraws the suit on her selling the property to him and she conveys it to him by a deed of 19th August 1886.

Even then he does not profess to have made any enquiry about the title-deeds, for he says he first knew of the mortgage to the plaintiff company at

the end of 1887. And this although the conveyance to him by Mrs. Smith (Exh. 3) contains the very unusual covenant on her part, that she had

delivered to him "all the title-deeds and other muniments of title in anywise relating or appertaining to the said premises." Mrs. Smith filed her

petition and schedule in the Insolvent Court in February 1888. All these circumstances combined with the unexplained absence of the title-deeds

from 2nd defendant's hands do in our opinion raise a strong suspicion of fraud or complicity with fraud on the part of 2nd defendant such as would

be sufficient to justify his being postponed to plaintiff's mortgage even on the principle of the latest English cases.

5. This is of course assuming that plaintiff company had no notice of 2nd defendant's mortgage. It is not alleged that they had actual notice, but it is

argued that 2nd defendant's mortgage being registered and registration being legal notice they must be taken to have had notice. In support of the

contention that registration is legal notice we are referred to the cases decided by the High Court of Bombay and particularly to the Full Bench

decision reported in I. L. R 6 B 168, *Lakshmandas Sarupchand v. Dasrat*, where the question was fully considered and it was declared that in

Bombay the courts had adopted the rule which prevails in America, and had held that registration does amount to notice to all subsequent

purchasers and mortgagees of the same property. In the English and Irish Courts, as admitted by the learned judges of the Bombay High Court in

the above case, the current of decisions had been the other way, though with an occasional expression of dissent from the principle by some of the

judges. As far as we know the High Courts of other Presidencies have not followed the High Court of Bombay in holding that registration is notice.

In a case reported in I. L. E 8 M 246, *Gangudhara v. Sivarama*, Turner C. J. observed, "It has not as yet been held in this Court that registration is

notice." Under these circumstances we prefer to follow the English and Irish decisions and to hold that registration is not of itself notice to

subsequent purchasers and mortgagees. To hold otherwise might have the effect of seriously disturbing titles created upon the understanding that

the law here was the law of the English and Irish Courts. Upon the abstract question of the comparative expediency of the one rule or the other we

say nothing. Much is to be said on both sides. It is for the legislature if it considers that it is expedient to make notice one of the effects of

registration to so enact in express words, as is done in the latest Yorkshire Registration Act, Statute 47 and 48 Vict, Ch. 54. The Indian legislature

must have been aware of the conflict between the English and Irish decisions and those of the Bombay High Court upon the subject, and yet in

laying down what shall be the effect of registration and non-registration they have abstained from declaring that notice to subsequent purchasers

and mortgagees shall be one of the effects of registration. We think it is not in the province of the courts to do that which the legislature has

abstained from doing. In the judgment in the case reported in I. L. R 12 M 424, the words occur ""Registration would be notice to subsequent

lenders, but without it how is a prior mortgage to be discovered?"" We do not understand that it was intended by those words to lay down the rule

that registration of itself would amount to notice. The 1st mortgage there was unregistered and it was pointed out that this was a reason for extra

caution on the part of the 1st mortgagee in parting with the title-deeds, as a subsequent purchaser or mortgagee would not be able to discover the

prior mortgage by searching the registry. The question whether registration amounted to notice or not was not raised in that case.

6. Upon this question we are referred by the learned Counsel for the appellants to the last clause of the definition of notice in the Transfer of

Property Act, Section 3--""A person is said to have notice of a fact when he actually knows that fact, or when, but for wilful abstention from an

inquiry or search which he ought to have made, or gross negligence, he would have known it &c."" We shall show hereafter when dealing with

another part of the argument for the appellants, that in our opinion the plaintiff company was not guilty of any wilful abstention from enquiry or of

gross negligence. No doubt the persons acting on behalf of the company did not make search in the Registration Office and had they done so they

would have discovered 2nd defendant's mortgage. It would have been more prudent had they done so but we are not prepared to lay down as a

general principle, that non-search of the registry is such gross negligence as to disentitle a subsequent purchaser or mortgagee to relief, for to do so

would be practically to make registration notice, which for other reasons we have declined to do. In the case reported at I. L. II 12 M 429, the

prior mortgage was registered and it was held by Keman J. that the subsequent mortgagees were not guilty of such, negligence as to disentitle them

to priority over the 1st mortgagee on the ground of his gross negligence in parting with the title-deeds. We do not think that plaintiff company by

reason of the non-search in the Registration Office for incumbrances can, under the circumstances, which we shall consider more fully hereafter, be

said to have been guilty of wilful abstention from a search which they ought to have made within the meaning of Section 3 of the Transfer of

Property Act.

7. It is further argued for the appellants that even if the plaintiff company would be disentitled to priority over 2nd defendant by reason of his gross

negligence, with regard to the title-deeds they themselves have been guilty of such gross negligence as to disentitle them to priority. With the matter

of negligence in not searching in the Registration Office, we have already dealt. It is also charged against them that they omitted to inquire for the

Collector's certificate and that their attention should have been particularly directed to the matter of the certificate by the recital in one of the title-

deeds (Exh. B3) of the old Collector's certificate, which, if they had asked for they might have got upon the track of the new certificate and of 2nd

defendant's mortgage. As to this we observe that the same document Exh. B3 which was a conveyance by 2nd defendant and some previous

mortgagors to Mrs. Smith contained a covenant that the property was then (January 1878) free from incumbrances. This of itself would divert

persons, dealing with Mrs. Smith and having no reason to suspect her of dishonesty, from inquiry as to incumbrances. The documents which

showed a legal title in Mrs. Smith being in her possession, the absence of the Collector's certificate would not of itself be sufficient to arouse

suspicion. The company's agents ascertained that Mrs. Smith was in possession of the property and she put them into possession by executing a

rent agreement in their favour. Although they might have been more careful we do not think that they were guilty of such gross negligence as to

disentitle them to relief:

8. We have dealt with the case on the assumption that 2nd defendant was entitled to rely on his mortgage of 1879. It is argued for respondent that

that mortgage is merged in his purchase of 1886. In August 1886 Mrs. Smith conveyed the property to 2nd defendant, the consideration stated in

the deed (Exh. III) being Rs. 15,000 made up of Rs. 14,291-10-6 due on the

mortgage of 1879 and Es. 420-5-6 cash. The conveyance says nothing about keeping alive the mortgage, on the contrary it appears on the face of it to extinguish it, for it conveys the property free from incumbrances and the consideration includes the amount due on the mortgage. Appellant's Counsel relies on Section 101 of the Transfer of Property Act as keeping the mortgage of 1879 alive for the benefit of 2nd defendant, That section enacts that ""where the owner of a charge or other incumbrance on immovable property is or becomes absolutely entitled to that property, the charge or incumbrance shall be extinguished, unless he declares, by express words or necessary implication that it shall continue to subsist, or such continuance would be for his benefit. Declaration express or implied there was none. The mortgage can only be saved from extinction by the latter words of the section on the ground that the continuance of the incumbrance would be for 2nd defendant's benefit. We are inclined to think that these words must have reference to the time when the conveyance was executed and. it is not clear that it could be said that at that time it would have been for his benefit that the mortgage should not be extinguished. And it is doubtful whether the mortgage could be considered to be kept alive even if it were for his benefit to do so in the face of the deed of conveyance which seems to extinguish it. We are not sure that the case might not have been decided against 2nd defendant on this ground. But we have followed the Lower Court in giving him the benefit of the doubt on this point and deciding the question of priority between his mortgage and plaintiff's.

9. We confirm the decree of the Lower Court and dismiss the appeal with costs.