

(1891) 11 MAD CK 0004
In the Madras High Court

Shan Maun Mull and Another

APPELLANT

Vs

Madras Building Company

RESPONDENT

Date of Decision : 24-11-1891

Acts Referred:

Transfer of Property Act, 1882 — Section 78

Citation : (1892) ILR (Mad) 268

Hon'ble Judges : Handley, J; Arthur J.H. Collins, J

Bench : Division Bench

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 second 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 the second 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. A. 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 second 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 the second 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 inquiries as to its truth at the Collector's office. This part ""of the second 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 their being so in her possession, and the question is whether he is on that account to be postponed to the second 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 the second 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 there classified and summarized, 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, etc." 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 Counties of England Fire

Insurance Company v. Whipp L.R. 26 Ch. 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, the second 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 plaintiff's mortgage.

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

Somasundra Tambiran v. Sakkarai Pattan 4 M.H.C.R. 369 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 second mortgagee, though a purchaser for value without notice, will not give

him priority. There must be some act or default on the part of the first 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 first 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 to lose his priority, because the mortgagor may

afterwards have dishonestly handed over the title-deeds to a second mortgagee.

"" The decisions upon Section 78 of the Transfer of Property Act

in *The Madras Hindu Union Bank v. C. Venkatrangiah* ILR 12 Mad. 424 *Damodara v. Somasundra* ILR 12 Mad. 429 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 second defendant should be postponed. The case of

Heivitt 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 the second defendant and will therefore postpone him to

plaintiff, It is argued for appellant that the circumstances of the case negative fraud on the part of the second 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 is between the second 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 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 1878. 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 deed of 19th

August 1886. Even then he does not profess to have made any inquiry 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, 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 the second defendant's hands do in our opinion raise a strong suspicion of fraud or complicity with fraud on the part of the second

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

5. This is of course assuming that the plaintiff company had no notice of the second defendant's mortgage. It is not alleged that they had actual

notice, but it is argued that the second 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 in *Lakshmandas Sarupchand v. Dasrat* ILR 6 Bom. 168 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 has 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 the other presidencies have not followed the High Court of Bombay in holding that

registration is notice. In *Gangadhara v. Sivarama* ILR 8 Mad 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 47 and 48 Vict., Cap. 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 the province of the Courts to do that which the Legislature has abstained from doing. In the judgment in *The Madras Hindu Union Bank v. C. Venkatrangiah* ILR 12 Mad. 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 first mortgage there was unregistered and it was pointed out that this was a reason for extra caution on the part of the first 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 appellant 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, etc. "" We shall show hereafter when dealing with another part of the argument for appellant that in our opinion the plaintiff company was not guilty of any wilful abstention from inquiry 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 the second 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 *Damodara v. Somasundara* ILR 12 Mad. 429 the prior mortgage was registered and it was held by KERNAN, J., that the subsequent mortgagees were not guilty of such negligence as to disentitle them to priority over the first mortgagee on the ground of his gross negligence in parting with the title-deeds. We do not think that the 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 appellant that even if the plaintiff company would be entitled to priority over the second 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 (Exhibit 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 the second defendant's mortgage. As to this we observe that the same document (Exhibit B3), which was a conveyance by the second defendant and some previous mortgagors to Mrs. A. Smith, contains 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 the second 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. A. Smith conveyed the property to second defendant, the

consideration stated in the deed (Exhibit III) being Rs. 15,000 made up of Rs. 14,291-10-6 due on the mortgage of 1879 and Rs. 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. The appellant's Counsel relies on Section 101 of

the Transfer of Property Act as keeping the mortgage of 1879 alive for the benefit of the second 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 the second 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 the second 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 the plaintiff's.

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