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(1916) ILR (Mad) 959 : (1916) 30 MLJ 331

Madras High Court

Case No: None

Punuga Subbian		APPELLANT
	Vs	
Nukalapati Rami Reddi and Others		RESPONDENT

Date of Decision: Jan. 12, 1916

Acts Referred:

- Trusts Act, 1882 - Section 90

Citation: (1916) ILR (Mad) 959 : (1916) 30 MLJ 331

Judgement

1. Mr. Krishnasami Aiyar argues that no cause of action is disclosed in the plaint. This case has been before the Courts during the last six years and yet this point was not raised hitherto; on that account we examined the pleadings carefully; it appears to us that prima facie the contention of the appellant is well founded. This appeal relates only to items 672A and 674B. The facts stated in the plaint are, that the plaintiff obtained" a mortgage in respect of these items and other "properties from certain persons who may be described as the Vavilla1 people. He brought a suit (Original Suit No. 108 of 1896) against the mortgagors. The right of the Vavilla people to mortgage the property was disputed by the 12th defendant who claimed title from certain persons who may be "called the Sarasvati people. The 12th defendant conveyed his rights to one Nalluri Samiah. Nalluri Samiah was made the 19th defendant. Issues 14 and 15 raised the question as to whether the property belonged to the Vavilla or the Sarasvati people. The judgment of the Munsif is not very clear on this point. In effect he jaeems to have found in favour of the Vavilla people; he gave a decree to the plaintiff. This was confirmed on appeal by the District Judge. While;a Second Appeal to the High Court was pending, the revenue payable to Government oh the property fell into arrears; and that 2nd defendant in this suit purchased the property at the revenue auction. The plaintiff now seeks to recover the property. His contention is that the 2nd defendant is a benamidar for Nalluri Samiah, the 19th defendant in the first suit, and that, as it wis the duty of the said Samiah to have paid the arrears, he must be deemed to have committed a fraud in allowing the property to be sold and in purchasing it in the name of the 2nd defendant for " his own benefit. In effect

the contention "is that the 2nd defendant is a trustee for the plaintiff. It was contended by Mr. Krishnasami Aiyar that there is no legal evidence on which the finding as to the 2nd defendant being a name lender to Samiah can be sustained. The Munsif refers to oral evidence relating to possession and to other circumstances in support of his finding : the Lower Appellate Court has confirmed that finding : we are unable to say that there is no legal evidence to support it. But granting that the 2nd defendant is a benamidar for Nalluri Samiah, it has to be proved that Samiah was under any legal obligation to pay the arrears of revenue due upon the lands. Prima facie, as we said before, the finding of the District Munsif in the mortgage suit negatives any subsisting right in the Sarasvati people from whom Samiah derived title at the time of the revenue sale. But as the point has been raised for the first time in this Court, we think it safe to call for a finding on the question.

Whether at the time of the purchase by the 2nd defendant at the revenue sale, the 19th defendant or the Sarasvati people from whom he claimed had such a subsisting interest in the property as made it obligatory on them to pay the revenue for nonpayment of which the property was sold?" This question does not refer to the initial liability to pay the revenue by virtue of the patta standing in the name of any of the parties, but to the question whether as between the plaintiff, the Vavilla people and the Sarasvati people inter se who was bound to protect the property from the revenue sale.

2. Both parties may adduce fresh evidence. The finding should be submitted within two months and seven days will be allowed for filing objections.

3. [In compliance with the order contained in the above judgment, the District Judge of Nellore submitted the following

FINDING : * * * * The plaintiff as I have said wanted to show that the mortgage in his favour was prior to the sale to Saraswati people. He urges that all that the Saraswati people got was the equity of redemption and Nalluri Samiah stands in their shoes and u/s 90 of the Indian Trusts Act, he was bound to pay the assessment. I think the plaintiff has not proved the facts on which he relies. Even if be had proved them, it would not advance his case, for Srinivasachari v. Gnanaprakasa Mudaliar ILR (1906) M. 67, is an authority for the position that there is no obligation on the purchaser of the equity of redemption to pay the public charges accruing due in respect of what he has purchased. It has been argued that the circumstances of that case were different, bat the principle is the same and the case seems to me quite applicable. It is further argued that if that be the law, it was unnecessary to remand this appeal but that argument here is for obvious reasons futile.

4. How the Sarasvati people originally came by the land seems to me still doubtful but it is perfectly clear that they were in possession and from them Bandepalli Venkatachelam got the land and from him Nalluri Samiah. It may be taken they were trespassers.

5. My finding on the issue sent down to me is that at the time of the purchase by the 2nd defendant at the revenue sale the 19th defandant or the Sarasvati people had no such subsisting interest in the property as made it obligatory on them to pay the revenue for non-payment of which the property was sold.]

JUDGMENT

1. The facts of the case have been fully stated in our order of remand. The finding in effect is that when the land was sold for arrears of revenue, the 19th defendant, who claimed to hold under the Saraswati people, was in possession. The District Judge further finds that the Saraswati people and those who derived title through them were trespassers. It is clear from the documents to which Mr. Bamachandra. Aiyar has drawn our attention that the possession of the Saraswati people commenced in or about 1882. Consequently at the time of the revenue sale in 1906, the 19th defendant had acquired title to the property by prescription. This title could not affect the right of the plaintiff who obtained his mortgage from the true owners, the Vavilla people, in 1884. As was pointed out in the recent Full Bench decision of this Court in Vyapuri v. Sonamma Boi Ammani (1915) 29 M.L.J. 645, a person holding a simple mortgage is not deprived of his right to bring the mortgaged property to sale because as against the mortgagora trespasser has been in possession over the statutory period. The point was not considered in the Pull Bench ruling whether the trespasser is not entitled to stand in the shoes of the mortgagor, although the rights of the mortgagee remained unaffected. We are of opinion that the trespasser acquired by prescription the rights of the mortgagor. The 19th defendant by tacking on the possession of the Saraswati people, acquired by adverse possession the equity of redemption in the property mortgaged to the plaintiff. The limited right in that equity which the mortgagor possessed passed to the trespasser. On these facts Mr. Ramacbandra Aiyar contended that the conduct of the 19th defendant in allowing the property to be sold for arrears of revenue and purchasing it in the name of the 2nd defendant was fraudulent and that the plaintiff was entitled to recover it. Nawab Sidhee Nuzur Ally Khan v. Rajah Ojoodhywam Khan (1866) 10 M.I.A. 540, was relied on for this position. The argument of the learned vakil presupposes that the 19th defendant was under a duty to pay the public charges u/s 65 clause (c). The first question therefore is whether the duty cast on the mortgagor passes to the acquirer of the equity of redemption by prescription. The point is not free from difficulty and is not covered by authority in this country. Mr. Krishnaswami Aiyar quoted Srinivasachari v. Gnanaprakasa Mudaliar ILR (1906) M. 67. It was held in that case that even a purchaser of the equity of redemption will not be affected by the equities created in favour of the mortgagee. Sadasiva Aiyar and Napier, JJ., in AIR 1915 Mad 633 , on the other hand point out that a provision in a statute which imposes a liability on a person binds his legal representatives and assigns also.

2. The authorities in England (see'' the cases cited in I Smith''s Leading Cases pp. 75 to 77) lay down that unless the assignee is named, in most cases, the covenant will not affect him. If we had to decide whether an assignee for value is affected by the covenant

mentioned in Section 65 clause (c), we would have referred the matter to a Full Bench. But the case of a person acquiring title not from but against the owner stands on a different footing.

3. The covenant created by the clause is in the nature of a personal covenant. Where a benefit is secured or a duty is cast on a personal though it be by virtue of being in possession of real property, the covenant is said to be personal. Shepp. Touchstone 161. In Dewar v. Goodman (1909) L.R. 1 A.C. 72, the House of Lords laid down that "a covenant to do an act not in respect of the demised premises but which will protect from forfeiture the estate of the lessee in the demised premises is not a covenant which runs with the land." Lord Loreburn points out that such a covenant "does not touch and concern the estate " simply because the estate may come to an end, if the covenant is broken. By parity of reasoning the duty cast on the mortgagor to pay the taxes, although its non-payment may result in the estate being sold for arrears of revenue is not a covenant which touches or concerns the property and as such runs with the land. It is a personal covenant affecting the person in possession under the contract.

4. The decision in In re Nisbet and Potts Contract (1906) L.R. 1 Ch. 386, at first sight lends colour to the suggestion that a person coming into possession by virtue of prescription is bound by similar covenants. That was a case of a negative covenant. The Court of Appeal considered that such a covenant was in the nature of a negative easement and that consequently it affected squatters on the land whether they acquired title to it or not. Collins, M.E. says, "It was admitted that a squatter could not take land freed from ah affirmative legal easement; and I understand it to be admitted also that if the right arising out of the restrictive covenant entered into by the former owner of the land was such as Sir George Jessel, M.R. considered it, namely, analogous to a negative easement, then the squatter would take the land subject to the paramount right created by the obligation imposed by the covenant which adhered to the land, and the burden of that covenant would pass to those persons who might become assignees of the land or might acquire in any way a title to the land." This decision is no authority for holding that a person holding property adversely is bound by all the obligations which rested upon the owner in respect of the property. On the other hand, it was pointed out by Lord Esher in Tichborne v. Weir (1892) 67 L.T. 735 that the title of the true owner is not transferred to the adverse owner, "The Statute does not convey but destroys the right." Bowen, L.J., quoting Dart"s Vendors and Purchasers, was of opinion that the acquirer can in no sense be said to stand in the shoes of the original owner. The point decided in the case was that a covenant to repair did not bind th6 person who acquired title by prescription. Brassington v. Llewellyn (1858) 27 L.J. Exch. 297 is to the same effect. See also Banning on Limitation page 84. It is true that the decisions above quoted were given with reference to leases. We see no reason why the same principle should not apply to mortgages. We must therefore hold that the 19th defendant by virtue of having acquired the equity of redemption in the mortgaged property was not under a duty to pay the taxes u/s 65 Clause (c) of the Transfer of Property Act.

5. Mr. Ramachandra Aiyar''s last contention was that apart from the statutory duty, any person who acquires property by fraud must restore it to the true owner; and he relied on Nawab Sidhee Nazur Ally Khan v. Rajah Ojoodhyaram Khan (1886) 10 M.I.A. 540, for this extreme position.

6. It may now be taken as settled that if there is a fiduciary relationship between the parties and one of them has committed a breach of duty, the person injured can compel the person benefited by the breach to restore the property he has acquired. That is really what was laid down in Nawab Sidhee Nuzur Ally Khan v. Rajah Ojoodhyaram Khan (1886) 10 M.I.A. 540. We do not agree with Mr. Ramachandra Aiyar that this judgment is authority for the proposition that if any body acquires property by fraud whether there is a fiduciary relationship between the parties or not, the true owner can recover possession. Sections 88 to 90 of the Trust Act show that the duty of restitution is cast only on persons occupying either a fiduciary position or who have a joint interest with the person defrauded. There is no authority for the broad proposition that no title can be acquired, if fraud has been used in its acquisition. We think the right to claim the benefit of a fraudulent advantage should be restricted to persons who are "under a duty to speak" or under same relationship as above indicated.

7. We must therefore hold that the plaintiff is not entitled to recover possession from the 2nd defendant.

8. We must allow the appeal, reverse the decrees of the courts below and dismiss the suit with costs of the 2nd defendant in this Court. Parties will bear their own costs in the Courts below.