

Balagurumurthy Chetty Vs. Ramakrishna Chetty and ors.

Balagurumurthy Chetty Vs. Ramakrishna Chetty and ors.

SooperKanoon Citation : sooperkanoon.com/776169

Court : Chennai

Decided On : Apr-12-1921

Reported in : AIR1921Mad277; (1921)41MLJ267

Appellant : Balagurumurthy Chetty

Respondent : Ramakrishna Chetty and ors.

Judgement :

1. Plaintiff, the transferee of a mortgage executed in favour of 37th defendant-appellant has obtained a decree against his transferor alone, it having been found that the mortgage itself is invalid for want of consideration. The contention for appellant (37th defendant) is that the transfer of a mortgage is not a sale of immoveable property within the meaning of Section 55, Transfer of Property Act, and reliance is placed on Samu Pathan v. Chidambara Odayan (1915) 29 M.L.J. 454. No doubt in that case the learned Judge, held that though it might be necessary to observe the formalities prescribed in Section 54 in transferring a mortgage, yet such transfer did not attract the provisions of Section 55. In order to make Section 54 applicable the transfer must be deemed to be a sale of immoveable property, and with respect, we are unable to see why it should not be treated as such a sale within the meaning of Section 55 also. In a recent case reported in Perutnal Animal v. Perumal Naicker, 40 M.L.J. 25 a Bench of this Court has held that the transfer of a mortgage by gift is a gift of immoveable property within the meaning of Section 123, Transfer of Property Act, and with the reasoning of that judgment we fully agree, and for the same reasons, hold that a

transfer by sale is a sale of immoveable property within the meaning of Section 55. That being so, under Section 55(2), the 37th defendant impliedly covenanted that the mortgage debt existed and he is liable in damages for the breach of that covenant.

2. It is next argued that this implied covenant is ousted by the specific covenant to make good to plaintiff any sums received by 37th defendant towards discharge of the mortgage debt and acknowledged under his signature. The principle that a specific covenant ousts an implied covenant is contained in this country in the words 'in the absence of a contract to the contrary' which appear in Section 55. It is evident that the specific covenant must relate to the same subject matter as that referred to in the implied covenant, vide, *Mahomed AH Sheriff v. Venkatapathy Raju* : (1920)39MLJ449 and *Ragavaiyengar v. Samachariar* (1913) 1 L.W. 8 and that is not the case here, for the covenant to make good monies received towards the mortgage debt itself implies the existence of a mortgage debt and is in no way inconsistent with the covenant that such a debt exists and is certainly not a contract to the contrary.

3. In any event we think 37th defendant would be liable on the footing of failure of consideration in the contract to transfer the debt.

4. We therefore hold that the Subordinate Judge's decree is right and dismiss this Second Appeal with costs.