

Appasami thevan and ors. Vs. Virappa thevan and ors.

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Court : Chennai

Decided On : Mar-20-1906

Reported in : (1906)ILR29Mad362

Judge : Arnold White, C.J.

Appellant : Appasami thevan and ors.

Respondent : Virappa thevan and ors.

Judgement :

Arnold White, C.J.

1. The plaintiffs sue on a mortgage dated November 18, 1890, executed by one Appasami Thevan, the father of defendants Nos. 1 to 4. The mortgage was unregistered. In 1895, Appasami Thevan sold the mortgage property by a registered sale-deed to one Kasi Thevan. Kasi Thevan's widow, as the guardian of Kasi Thevan's minor son, sold the property to the fifth defendant in January 1902 by a registered sale-deed. The fifth defendant, in his written statement, alleges that the sale by Appasami Thevan to Kasi Thevan and by Kasi Thevan's widow to him were without notice of the mortgage to the plaintiffs. The mortgage to the plaintiffs contains a personal covenant to repay the mortgage money, and the plaintiffs claimed as against all the defendants payment of the mortgage money, and, in default, recovery of the amount by sale of the property. In the Court of First Instance, the defendants Nos. 1 to 4 did not appear. The plaintiff's pleader did not

ask for a decree against the property but asked for a personal decree against defendants Nos. 1 to 4, the money to be realized from the assets of the deceased Appasami Thevan (the mortgagor) in their hands. A decree was given in those terms. Defendants Nos. 1 to 4 appealed. I had some doubt whether it was open to these defendants to appeal, since they allowed judgment to go against them by default in the Courts of First Instance see *Walker v. Rudden* L.R. 5 Q.B.D. 267.

2. The District Judge appears to have been of opinion that these defendants were entitled to appeal as the reason for their not appearing in the Court of First Instance was that the plaintiffs' case in that Court was that the mortgage money should be recovered by the sale of the property and they were not interested in opposing this claim, as the property had been sold to the fifth defendant. Why defendants Nos. 1 to 4 should have assumed that no claim was going to be made against them, having regard to the form of the prayer in the plaint, is not clear. The point that defendants Nos. 1 to 4 were not entitled to appeal was not taken before the lower Appellate Court or before this Court. Section 540 of the Code of Civil Procedure provides that an appeal may lie from an original decree passed *ex parte*. It is not necessary for me to decide, whether, in the events which happened, defendants Nos. 1 to 4 had a right of appeal. For the purposes of this judgment I assume that they had. The appeal was allowed by the lower Appellate Court on the ground that the plaintiffs' personal remedy against defendants Nos. 1 to 4 was time barred. So far as the personal covenant to repay is concerned the plaintiffs' remedy is clearly barred, but the question for determination is - Have the plaintiffs the right to recover the mortgage money from defendants Nos. 1 to 4 under the provisions of Section 68 of the Transfer of Property Act, which gives a mortgagee a right to sue his mortgagor for the mortgage money (a) when the mortgagor binds himself to repay it, (b) when the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor? If the fifth defendant had notice of the plaintiffs' mortgage, the sale to him would be subject to the incumbrance notwithstanding the fact that the mortgage was unregistered and the sale was registered see *Krishnamma v. Suranna* I.L.R. Mad. 148. Defendants Nos. 1 to 4, however, do not allege that either the fifth defendant or his vendor had notice of the incumbrance. The fifth defendant alleges that the sales to Kasi Thevan and by Kasi Thevan's widow to himself were for good

consideration and with-out notice. There is no finding upon the question. If notice is relied on, it must be proved. In the absence of any evidence that the fifth defendant and his vendor took with notice, and having regard to the allegation in the fifth defendant's written statement that they took without notice, I am of opinion that I must deal with the case on the assumption that there was no notice. That being so, it seems to me clear that the mortgagee was deprived of his security by the wrongful act of the mortgagor and that he is entitled to sue the mortgagor for the mortgage money under Section 68 of the Transfer of Property Act. It was not suggested that the plaintiffs' rights under paragraph (b) of the section were barred by limitation, and I certainly cannot accede to the argument that paragraph (b) of the section does not apply in cases where the mortgage deed contains a personal covenant to repay.

3. I allow this appeal and set aside the decree of the lower Appellate Court and restore that of the Munsif, The plaintiff's are entitled to their costs throughout.

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