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Court : Chennai

Decided On : Jan-28-1892

Reported in : (1892)ILR15Mad304

Judge : Wilkinson and ;Subramania Ayyar, JJ.

Appellant : Gopalasami

Respondent : Arunachella

Judgement :

1. The plaintiff obtained a usufructuary mortgage of certain lands and held possession of the same until he was ousted by a person who purchased the property in execution of a money decree held by the latter against the first defendant, the mortgagor.
2. The plaintiff now sues for the recovery of the mortgage money.
3. The mortgagor did not bind himself to repay the mortgage amount. The clause in the instrument of mortgage, relied on by the plaintiff, merely provides that if the mortgage money be repaid at the end of any fasli within the 27th May 1886, the mortgagor should be put back into possession of the lands. The Subordinate Judge was, therefore, in error in holding that there was a promise to pay.
4. The circumstances under which the plaintiff was dispossessed were these. Before the lands in question were sold by the Court, the plaintiff preferred a claim

based upon his mortgage; but it was disallowed on the ground that, at the date of the mortgage, the property was under attachment on account of a decree held by another creditor of the present defendant. It is, however, now admitted that there was no sale on account of debt due under the latter decree, and that the debt for which the property was eventually sold was not a claim enforceable under that attachment. Section 276 of the Civil Procedure Code had, therefore, no application to the case. The mortgage to the plaintiff was valid against the creditor who subsequently got the property attached and sold, and became the purchaser thereof. The order rejecting the claim was wrong; but the plaintiff took no steps to have it set aside and allowed the purchaser to obtain possession of the lands sold.

5. The defendant had nothing to do with the claim put in by the plaintiff or the order passed thereon, and it is clear that the defendant was in no way responsible for the erroneous order or the plaintiff's omission to question it by a suit.

6. It is argued for the plaintiff that the failure of the defendant to pay up the judgment debt, which led to the sale, entitles the plaintiff to sue for the money under Clause (b) of Section 68 of the Transfer of Property Act. This contention is unsustainable. The creditor, who held the money decree, had a right to bring to sale the equity of redemption possessed by the defendant in the lands, and the defendant was at liberty to allow such equity to be conveyed by Court sale for his debt. The sale thereof could not properly have affected any of the plaintiff's rights as mortgagee and the defendant cannot be treated as having thereby committed a wrongful act or default whereby the mortgagee was deprived of the whole or any portion of his security, within the meaning of Clause (6) of Section 68.

7. The next contention is that the defendant failed to secure the possession of the mortgage property to the plaintiff. In support of this stress is laid on the words in Clause (c) of Section 68 'without disturbance by any other person', and on the absence in the clause in question of any qualifying provision, such as that contained in Section 7 of the English Conveyancing Act of 1881, where the covenant is stated to be 'against lawful interruption or disturbance by the person who conveys as beneficial owner or any other person not being a person claiming in respect of an estate or interest subject where to the conveyance is expressly

made.' Though the last part of Clause (c) is not as clear as it should be, yet we cannot think that the Legislature intended to make the mortgagor liable for the wrongful acts of third parties. Covenants for quiet enjoyment, however generally expressed, must be understood as applying merely to the acts of those claiming by title. The rule is the same whether the covenant is a covenant in law, or an express covenant to indemnify not against an individual named but against all persons. The reason of the law is clear. For it would be unreasonable to hold that the grantor could either foresee or prevent the tortious acts of strangers, and the remedy against such tortious act is against the wrong-doers (Hayes v. Bickerstaff, Vaughan's Reports, 118; Woodfall on Landlord and Tenant, 14th edition, p. 695). We see no warrant for thinking that the Legislature meant to depart from so sound and well established a rule. In our opinion, the proper construction to be placed upon the words ' any other person' in the concluding part of Clause (c) of Section 68 is to interpret them to mean any other person having a title.

8. Upon the facts admitted, the mortgage to the plaintiff was binding upon the purchaser who ousted him. It was not alleged that the defendant committed any breach of the implied contract under Clause (b) of Section 65 in respect of the defence of the mortgagor's title should the mortgagee's possession be unlawfully disturbed. If the plaintiff placed himself in a position which precluded him from objecting to his dispossession by the purchaser at the Court sale, the defendant was not answerable for such a state of things.

9. We must allow the appeal, reverse the decrees of the Courts below, and dismiss the suit with costs.

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