SUBBARAYA v. KRISHNAPPA.

ing to departmental rules the plaintiffs should have had the land, but the breach of a departmental rule will not create a legal cause of action.

We are of opinion therefore that the District Munsif was right in holding that plaintiffs have no title to the disputed land either by grant or prescription. The appeal must be allowed and the decree of the Lower Appellate Court reversed, the suit being dismissed with all costs throughout.

ORIGINAL CIVIL.

Before Mr. Justice Handley.

1889. July 26.

THE MADRAS HINDU UNION BANK (LIMITED) (PLAINTIFF),

v.

C. VENKATRANGIAH AND OTHERS (DEFENDANTS).*

Transfer of Property Act—Act IV of 1882, s. 78—Priority of mortgages—Gross negligence—Estoppel—Agency.

On the 20th of February 1888, defendant No. 1 executed a mortgage in favor of the plaintiff Company. Defendants Nos. 2 and 3 bound themselves as sureties for the due payment of the mortgage amount, on default by the mortgagor. This mortgage had not been registered at the date of the execution of the mortgages next referred to.

On the 27th of April 1888, the Secretary of the plaintiff Company handed over to defendant No. 1 most of the title-deeds which had been delivered to the plaintiff Company on the execution of the mortgage, and defendants Nos. 1 and 3 undertook that they would raise a loan thereon and discharge the debt due to the plaintiff, or return the title-deeds if they failed in raising the loan. On the 28th April 1888 defendant No. 1 deposited the title-deeds with defendant No. 4 and executed a mortgage to her for Rs. 4,000; and on the 7th May 1888 he executed an instrument creating a further charge in her favor for Rs. 1,000. These two sums were applied by defendant No. 1 to his own use, and not in discharge of the prior mortgage. The mortgages to defendant No. 4 described the mortgage premises as being then free from incumbrances:

Held, that the plaintiff Company had been guilty of gross negligence in letting the title-deeds out of their possession and that the mortgages of defendant No. 4 had accordingly priority over the mortgage to the plaintiff Company.

THIS was a suit in which the plaintiff Company alleged *inter alia* that by an instrument, dated the 20th February 1888, defendant No. 1 mortgaged to the plaintiff Company certain of his immovable

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* Civil Suit No. 140 of 1888.

property to secure payment of the sum of Rs. 8,000 with interest thereon. By a further instrument, dated the 2nd March 1888, defendants Nos. 2 and 3 bound themselves to pay to the plaintiff Company the said sum of Rs. 8,000 with interest on default by defendant No. 1. According to the averments in the plaint, defendants Nos. 1 and 3 requested the Secretary of the plaintiff Company on the 27th April 1888 to give them the title-deeds of the mortgaged premises agreeing that they would either raise a fresh loan on them and repay the mortgage amount with interest up to date or return the title-deeds; and the Secretary believing the request to be made *bonâ fide* sent a portion of the title-deeds to defendants Nos. 1 and 3 in charge of a clerk in the employ of the plaintiff Company; and defendants Nos. 1 and 3 obtained possession of the deeds from the clerk representing to him that they wished to show the same to a third party for the purpose of raising a loan thereon to pay off the plaintiff's mortgage. The plaint further alleged that the amount due was not discharged nor the title-deeds returned. Defendant No. 4 was joined because she claimed priority in respect of a mortgage and instrument of further charge executed in her favor by defendant No. 1 on the land mortgaged to plaintiff.

Defendant No. 4 in her written statement claimed priority over the mortgage in favor of the plaintiff Company on the ground that the said mortgage and further charge respectively were taken by her *bonâ fide* for consideration and without notice of the plaintiff's mortgage. To this part of the pleadings the fourth issue related. It was framed as follows:—

Whether defendant No. 4 is by reason of the circumstances mentioned in her written statement entitled in respect of her mortgage and further charge to priority over the plaintiff's mortgage.

The Acting Advocate-General (the Hon. Mr. *Spring Branson*), (Mr. *W. Grant* with him) for the plaintiff.

The Bank is not bound by the act of the Secretary in parting with the title-deeds, for it was not within the scope of his authority. But if the Bank were bound, the Secretary's conduct did not amount to such gross neglect as to deprive the Bank of priority. The gross neglect must amount to fraud. Even if there were neglect on the part of the plaintiff's Secretary, there was contributory negligence on the part of defendant No. 4. The whole of

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the title-deeds were not handed to defendant No. 4, and she was accordingly put on enquiry. *Northern Counties of England Fire Insurance Company* v. *Whipp*(1), and *Mutha* v. *Sami*(2).

Mr. *Johnstone* (Mr. *R. F. Grant* with him) for defendant No. 4.

The Secretary represented the Bank, and the Bank is bound by his acts. The delivery of the title-deeds was within the scope of his authority. He was the ostensible Agent of the Bank and the Bank is estopped from questioning his authority. The conduct of the Secretary did amount to gross negligence. It placed defendant No. 1 in a position to perpetrate a fraud, and section 78 of the Transfer of Property Act applies. The deeds delivered to defendant No. 1 were practically all the title-deeds. *Perry-Herrick* v. *Attwood*(3), *Briggs* v. *Jones*(4), *Northern Counties of England Fire Insurance Company* v. *Whipp*(1).

The further arguments adduced at the hearing with reference to the above issue appear sufficiently for the purpose of this report from the following passage extracted from the judgment:—

His Lordship, having taken time to consider, delivered judgment with reference to the fourth issue as follows:—

JUDGMENT.—The fourth issue raises a difficult question as to the priority of the mortgages to the Bank, and the fourth defendant. The facts appear to be as follows:—On 27th April 1888 the title-deeds relating to the mortgaged property, with the exception of some unimportant papers, were given by the Secretary to the first and second defendants,—he taking from them two letters,—for the purpose of enabling them to raise a loan elsewhere to pay off the mortgage. These letters contemplate some person being sent with the deeds on behalf of the Bank, and the case set up in the plaint is that a clerk and bill collector of the Bank were sent with the deeds. This however was given up in the course of the case, and it was admitted that nobody on behalf of the Bank was sent with the deeds. The first and third defendants took the deeds next day to the fourth defendant's son who managed her business, and a mortgage for Rs. 4,000 was executed that day, and that sum, less a small deduction for cost of stamp and charity, was paid to the first defendant. On 7th May a further mortgage to the fourth defendant for Rs. 1,000 was executed, and that sum was received

(1) 26 Ch. D., 482. (2) 8 I.L.R., Mad., 200.
(3) 2 De G. & J., 21. (4) L.R., 10 Eq., 92.

by the first defendant. At the time of the execution of these mortgages the plaintiff's mortgage was not registered. Both the mortgages to the fourth defendant contain certain statements that no prior mortgage existed and I am satisfied on the evidence that the fourth defendant, or rather her son who managed the transaction for her, advanced the money and took the mortgage *bonâ fide* and without any notice of the plaintiff's mortgage. The question I have to determine is whether under these circumstances the plaintiff's mortgage is to be postponed to the fourth defendant's. The first question which arises is how far the plaintiff Bank is liable for the Secretary's acts or omissions, and I think they are liable in this case. They left the deeds in the custody of the Secretary, and it would, I think, be well within the scope of his business as Secretary to allow them to go out of his possession for the purpose of enabling the mortgagor to raise a loan elsewhere to pay off the Bank's mortgage. If he did not take proper precautions in doing this and enabled the mortgagor to defraud others the Bank is responsible for his carelessness. This is not like the case of *Northern Counties Fire Insurance Company* v. *Whipp*(1). There the manager of a Company having mortgaged his own property to the Company, and being in custody of the title-deeds as manager, fraudulently executed a mortgage to a third party without notice of the Company's mortgage, and it was held that the Company did not lose their priority. But there the manager was certainly acting outside the scope of his duties. He was not the agent of the Company for the purpose of defrauding them, and they could not have anticipated that he would use the possession of the title-deeds to do so. Then in this case assuming that the acts or omissions of the Secretary are such as the Bank is responsible for, are they such as entitle fourth defendant to priority? Section 115 of the Evidence Act as to estoppel is relied on by fourth defendant's Counsel, but I think it has no application to the case as there is nothing to show that the Secretary had any intention to join in the fraud on the fourth defendant. The provision of law affecting the case is section 78 of the Transfer of Property Act, and the question to be decided is whether the acts or omissions of the Secretary amount to gross negligence within the meaning of that section. Apart from

(1) L.R., 26 Ch. D., 482.

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authority, I should consider that a prior mortgagee parting with the title-deeds to the mortgagor for the purpose of raising money by another mortgage, is guilty of gross negligence unless he takes ordinary precautions that any person advancing money on the security of the deeds should know of his mortgage, such as sending some person with the deeds, insisting that they should be inspected in his presence or otherwise. Non-registration would not of itself be gross negligence as the law allows four months, but it is a reason for extra caution. Registration would be notice to subsequent lenders, but without it how is a prior mortgage to be discovered?

The cases of *Perry Herrick* v. *Attwood*(1), *Briggs* v. *Jones*(2), are directly in point and confirm this view. In the case of the *Northern Counties of England Fire Insurance* v. *Whipp*(3) before referred to, all the decisions upon this subject are reviewed and certain principles are laid down which certainly seem rather to affect the doctrine of *Perry Herrick* v. *Attwood* (1), and *Briggs* v. *Jones*(2), and to require that there should be an element of fraud in the negligence of the prior mortgagee to constitute such gross negligence as would postpone him to the subsequent incumbrancer. But both the cases above-mentioned are referred to in the Judgment in the later case and not dissented from, and it must be taken that they were held to be well decided, and in neither of these cases there was any suggestion of fraud on the part of the first mortgagee. I have been referred by the learned Counsel for the fourth defendant to a decision of Kernan, J., in *Damodara* v. *Somasundara* (4) where the learned Judge seems to have followed *Briggs* v. *Jones*(2), taking the same view as I now take of what constitutes gross negligence for which a prior mortgage will be postponed. For the plaintiff the case of *Mutha* v. *Sami* (5) is relied on, but in that case the Court really found that the prior incumbrancer was guilty of no negligence at all and did nothing but deal with his own mortgage document as he had a perfect right to do, and *Briggs* v. *Jones*(2) is quoted in the judgment without dissent. Some stress is laid by the plaintiff's Counsel on the fact that the Secretary of the Bank kept back some of the papers relating to the mortgaged property. But I think there is nothing in this.

(1) 2 De G. & J., 21. (2) L.R., 10 Eq., 92.
(3) L.R., 26 Ch. D., 482. (4) See judgment printed below.
(5) I.L.R., 8 Mad., 200,

The documents he parted with carried the title as far back as 1825, and there was nothing in them to put the fourth defendant upon enquiry for further papers. It is argued for the plaintiff that the negligence and undue haste of the fourth defendant's son in concluding the transaction conduced to the fraud practised upon him by the first defendant, and that the fourth defendant is therefore not entitled to priority. I cannot see that there was any negligence on the part of the fourth defendant's son. The title-deeds were on the face of them all in order, and there was nothing to excite a suspicion that there was a prior incumbrance, and enquiry at the Registration Office would have shown nothing. The mortgagor declared in the mortgage deeds there was no prior incumbrance and there was apparently no reason why he should not be believed. I find upon the fourth issue that the fourth defendant is entitled, in respect of her mortgages of 28th April 1888 and 7th May 1888, to priority over the plaintiff's mortgage.

Branson and *Branson*—Solicitors for plaintiff.

Grant and *Laing*—Solicitors for defendants.

ORIGINAL CIVIL.

Before Mr. Justice Kernan.

DAMODARA (PLAINTIFF),

v.

SOMASUNDARA AND OTHERS (DEFENDANTS).*

Transfer of Property Act—Act IV of 1882, *s.* 78—*Priority of mortgages—Gross negligence—Registration.*

A mortgagee at the request of the mortgagors returned to them their certificate of title to the mortgage premises to enable them to raise money to pay off his mortgage. This mortgage was duly registered. The mortgagors, who remained in possession of the mortgage premises throughout, having shown the certificate to a third person whom they informed of the existence of the first mortgage, and borrowed Rs. 400 from him, subsequently informed him that the first mortgage was paid off, delivered the certificate to him, and executed to him a mortgage of the same premises to secure the sum of Rs. 400, and a further sum of Rs. 800:

Held, that though the second mortgagee had been wanting in caution, yet since he had been thrown off his guard by the conduct of the first mortgagee, in returning to the mortgagors their certificate of title, the second mortgagee was entitled to priority in respect of his security over the first mortgagee.

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* Civil Suit No. 152 of 1888.