

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Benson.

KAMESWARAMMA (SECOND DEFENDANT¹), APPELLANT IN
SECOND APPEAL NO. 3058 OF 1903, AND (PLAINTIFF), APPELLANT
IN SECOND APPEAL NO. 3059 OF 1903, 1905
September 14.

v.

SITARAMANUJA CHARLU AND ANOTHER (PLAINTIFFS AND FIRST
DEFENDANT), RESPONDENTS IN SECOND APPEAL NO 3058 OF 1903,
AND (SECOND AND FIRST DEFENDANTS), RESPONDENTS IN SECOND
APPEAL NO. 3059 OF 1903.*

*Transfer of Property Act IV of 1882, s. 40—Trust Act II of 1882, s. 91—Mortgagee
with knowledge of facts which might have revealed the existence of an equitable
right, bound by such right.*

Where a mortgagee, at the time of his mortgage, is aware of circumstances which ought to have put him on enquiry, and such enquiry if made, would have revealed the existence of an agreement by the mortgagor to mortgage the property to a third party, the mortgagee's rights, will on the principles embodied in section 40 of the Transfer of Property Act and section 91 of the Trusts Act, be postponed to the rights of such third party.

ORIGINAL SUIT No. 410 of 1901 in the Court of the District Munsif of Masulipatam was instituted by the plaintiff to recover the amount due on a mortgage bond executed by the first defendant's cousin. The second defendant held a prior mortgage on the same properties and the plaintiff claimed priority over the second defendant on the ground that there was, at the time of the mortgage in favour of the second defendant, an agreement to mortgage the property to the plaintiff and that the second defendant was aware of such agreement. The mortgage deed of the second defendant recited that the title-deeds of the property were with the plaintiff as security for a debt.

The second defendant instituted Original Suit No. 31 of 1902 in the same Court on his mortgage, making the plaintiff in Original Suit No. 410 of 1902, second defendant.

* Second Appeals Nos. 3058 and 3059 of 1903, presented against the decrees of V. Venugopaul Chetty, Esq., District Judge of Kistna at Masulipatam, in Appeal Suits Nos. 641 and 642 of 1902, presented against the decrees of M.R. Ry. S. Ramaswami Ayyar, District Munsif of Masulipatam, in Original Suits Nos. 31 of 1902 and 410 of 1901.

KAMESWA-
RAMMA
v.
SITHARAMA-
NUJA
CHARLU.

The substantial question in both cases was whether the plaintiff in Original Suit No. 410 of 1901 had priority over the second defendant.

The District Munsif held that he had priority but the District Judge on appeal held that he had not.

Plaintiff in Original Suit No. 410 of 1901 preferred these second appeals.

K. S. Ramaswami Sastri for *K. Subrahmania Sastri* for appellant.

Dr. S. Swaminadhan and *T. Ramachandra Rau* for first respondent.

JUDGMENT.—We are clear that the information given to Sitharamanuja Chari that the title deeds were deposited with Kameswaramma "as security towards the debt of the note for Rs. 350 executed and given on the 11th September 1897 in favour of Kameswaramma" was sufficient to put him on enquiry as to why the deeds were not with the mortgagor and he must be held to have had constructive notice of the agreement to give Kameswaramma a mortgage of the lands. In accordance with the principles embodied in section 40 of the Transfer of Property Act and section 91 of the Indian Trusts Act Sitharamanuja's mortgage interest must be postponed to that of Kameswaramma.

We set aside the decrees of the Courts below in Original Suit No. 410 of 1901 and direct that Kameswaramma have the usual mortgage decree with costs throughout, and in Original Suit No. 31 of 1902 that the decree in favour of Sitharamanuja be subject to the mortgage amount due to Kameswaramma as found in Original Suit No. 410 of 1901. Kameswaramma must have her costs throughout in this suit also from Sitharamanuja Chari.