

A

R. SANTHANKUMAR NADAR

v.

INDIAN BANK LTD., MADRAS & ORS.

February, 6, 1967

B

[J. C. SHAH AND G. K. MITTER, JJ.]

*Transfer of Property Act (4 of 1882), ss. 51 and 69—Applicability of s. 51 to purchaser of mortgaged property with knowledge of mortgage—Notice to assignee of exercise of right of sale under s. 69—If necessary.*

C

A mortgage was created over property situate in the City of Madras and the mortgage deed conferred on the mortgagee the power under s. 69 of the Transfer of Property Act, to sell the property without the intervention of the Court. Thereafter, the appellant purchased a small portion of the property from the mortgagors. The sale deed provided that the mortgagors (vendors) should get the property sold released from the mortgage within one year, that in default thereof the appellant (vendee) would be at liberty to enforce his rights to compel the vendors to do so, and that the vendors should indemnify the vendee for all expenses and damages; but, no such steps were taken either by the vendors or the vendee. After the appellant's purchase, a notice was issued on behalf of the mortgagee, to the mortgagors, in terms of the mortgage deed, as required by s. 69(2), but no notice was served on the appellant. The property mortgaged was then widely advertised for sale and was bought by the first respondent bank. The bank then filed the suit for vacant possession, mesne profits and other reliefs. The appellant contended that: (1) the sale was invalid and not binding on his portion in the absence of notice to him, and (2) as a *bona fide* purchaser he was entitled, under s. 51 of the Act, to the value of improvements effected by him. The High Court rejected the contentions and decreed the suit.

D

E

In appeal to this Court,

F

HELD: (1) Section 69(2) lays down that the notice requiring payment of the mortgage money may be given to the mortgagor or to one of several mortgagors, where there are more than one. In the present case, the mortgagors had not parted with their entire interest in the property, and the appellant stood in the shoes of the mortgagors with respect to the portion purchased by him. Therefore, notice having been issued to the mortgagors the appellant was not entitled to such notice. Since he knew of the power of sale contained in the mortgage deed and there was no fraud or collusion in the sale of the property to the bank, the appellant had no cause for complaint. [615 E-F; 616 G]

G

*Muncherji Furdoonji Mehta v. Noor Mahomedbhoy Jairajbhoy Pirbhoy*, I.L.R. 17 Bom. 711 and *Hoole v. Smith*, 17 Ch. D. 434 explained.

(2) Section 51 of the Act has no application to the appellant at all, as, in the circumstances of the case, he could not have believed that he was absolutely entitled to the property. [617 E]

H

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 505 of 1965.

Appeal by special leave from the judgment and decree dated March 11, 1964 of the Madras High Court in Original Side Appeal No. 11 of 1960.

*R. Thiagarajan* and *R. Ganapathy Iyer*, for the appellant. A

*M. S. K. Sastri* and *M. S. Narasimhan*, for respondent No. 1.

The Judgment of the Court was delivered by

**Mitter, J.** This is an appeal from a judgment and decree of the High Court of Judicature at Madras on special leave granted by this Court. B

The owners of the property situate in the City of Madras created a mortgage over it in 1944 in favour of one Jagmohan Prasad Bhatta with power to him to sell the mortgaged property without the intervention of the Court. On April 22, 1950 the appellant before us purchased a small portion of the property from the mortgagors, the vendors covenanting to get the property mentioned in the schedule to the document released from the mortgages mentioned within a period of one year, in default whereof the vendee was to be at liberty to enforce his rights to compel the vendors to do so in appropriate proceedings and the vendors agreed to indemnify the purchaser for all such expenses and damages. The original mortgagee died on March 14, 1950 leaving a will and bequeathing the entire property in equal shares to several persons. The executor to the will of the deceased executed a deed of transfer in favour of the said legatees on May 14, 1951. The legatees executed a general power of attorney in favour of one Gangadhar Bhatta, the 8th defendant, conferring on him all powers including the power to realise the amounts due under the mortgage dated September 21, 1944 and to take other necessary steps. On May 28, 1952 a notice was issued in terms of the mortgage deed under s. 69 of the Transfer of Property Act. There is no dispute that it was not served on the appellant. The sale was widely advertised and was adjourned from time to time till April 26, 1953 when the property was purchased by the 1st respondent, the Indian Bank Ltd., for a sum of Rs. 1,12,500. The sale-deed in favour of the bank was executed on July 4, 1953. The bank filed a suit on April 26, 1954 praying for vacant possession of portions of the property, decree for mesne profits against some of the defendants and other reliefs. Before the learned single Judge of the Madras High Court who heard the suit, it was contended on behalf of the present appellant that the sale was invalid in the absence of notice thereof to him. The learned Judge turned down the contention that the sale was fraudulent as alleged by the appellant. He also rejected the contention put forward on behalf of the appellant that he was a *bona fide* purchaser within the meaning of s. 51 of the Transfer of Property Act and as such entitled to the improvements effected by him, namely, the cost of erecting the structures he had put up thereon. The appellant filed an appeal before the High Court of Madras alleging identical grounds in appeal. After losing in the High Court, the appellant applied for special leave to this Court which was granted raising six grounds in his C D E F G H

A petition. By his statement of case filed in this court, the appellant sought to contend that the provisions of s. 69 of the Transfer of Property Act allowing the exercise of the power of sale after notice to any one of the mortgagors offended Arts. 19 and 14 of the Constitution and as such were liable to be struck down. In paragraph 2 of his written statement he had raised the plea that the power of sale in terms of s. 69 of the Transfer of Property Act was *ultra vires* the Constitution of India as being discriminatory and opposed to the fundamental rights of citizens. Apparently the plea was abandoned at the hearing because no issue was raised thereon at the trial of the suit or in appeal to the Division Bench. We indicated that we could not allow the appellant to urge this plea at this stage.

C The point that the sale under the provisions of the mortgage deed was invalid because of want of notice to the 16th defendant is not one of substance. Section 69 sub-s. (1) gives a mortgagee or any person acting on his behalf the power to sell or concur in selling the mortgaged property or any part thereof in default of payment of the mortgage money, without the intervention of the court in the cases specified in sub-cl. (a), (b) and (c) of that sub-section. Sub-s. (2) of s. 69 lays down *inter alia* that no such power shall be exercised unless and until notice in writing requiring payment of the principal money has been served on the mortgagor, or on one of several mortgagors and default has been made in payment of the principal money or of part thereof, for three months after such service. The language of this sub-section is clear and unambiguous. The section lays down in no uncertain terms that the requisite notice may be given to the mortgagor or one of several mortgagors where there is a number of them, the obvious idea being that the mortgagor who is given the notice is constituted the agent of the other mortgagors to receive the same. It may be hard on a person in the position of a mortgagor to get no notice under this section if he comes to learn that the property has been sold without any notice to him. But if there has been no fraud or collusion in the matter, he has no cause for complaint. Our attention was however drawn to a decision of the Bombay High Court in *Muncherji Furdoonji Mehta v. Noor Mahomedbhoy Jairabhoy Pirbhoy*<sup>(1)</sup> and it was contended on the strength thereof that an assignee from a mortgagor must be served with a notice of sale if he is to be bound thereby. The facts there were as follows. The defendants in the suit before the Bombay High Court were the first mortgagees. The plaintiffs were puisne mortgagees of the property. The property had been advertised for sale by the defendants several times before the plaintiffs took any step in the matter. In April 1893, the defendants advertised the mortgaged property for sale and the plaintiffs filed a suit and obtained a rule *nisi* with an interim injunction restraining the defendants,

(1) I.L.R. 17 Bombay 711, 715.

from proceeding with the sale. It was contended on behalf of the plaintiffs that the defendants had no power to sell at all because the mortgage deed provided that notice should be given to the mortgagors or their assigns and the defendants had not given notice to the plaintiffs who were assigns of the equity of redemption. It was however found that the defendants had given a notice of sale to the mortgagors on August 31, 1891 three days before the plaintiffs had any interest in the equity of redemption and Starling, J. who decided the case observed :—

“.....as that appears to me to be a proper notice, I do not think that any further notice would be required to be given to any person who at that time was not an assign, in order to enable the defendants to sell under that notice; because I am of opinion that an assign must take things in the state in which he finds them, and cannot claim to alter rights which have accrued before he has any authority to interfere.”

Commenting on this case, the learned commentators of Mulla's Transfer of Property Act (Fifth Edition) at page 500 state :

“If the mortgagor has transferred his interest, either to a purchaser or to a subsequent mortgagee, and the mortgagee is aware of it, he should give notice to the transferee; but not if the transfer has taken place after the mortgagee has already given notice to the mortgagor.”

Learned counsel appearing on behalf of the appellant wanted to press this observation into service by saying that as his client had purchased a portion of the property by a registered deed two years prior to the notice of sale it was incumbent on the mortgagee to give him a notice. This contention cannot be accepted. It will be noticed that in the Bombay case there was no reference to s. 69 of the Transfer of Property Act or the powers of the mortgagee thereunder. Moreover, the mortgage deed in that case expressly provided for notice being given to the mortgagors or their assigns. In the present case, the mortgagors had not parted with their entire interest in the property. At best the appellant stood in the shoes of the mortgagors with respect to a portion of the property. He knew of the power of sale contained in the mortgage deed and that is why he wanted to safeguard himself against such sale by insertion of a clause for indemnity.

The English decision in *Hoole v. Smith*<sup>(1)</sup> referred to in the above Bombay judgment does not help the appellant before us. In that case the mortgage deed provided that the power of sale was not to be exercised unless and until notice had been given in writing to

(1) 17 Ch. D. 434.

A the mortgagor, his executors, administrators or assigns to pay off the moneys for the time being due and owing on the said indenture of mortgage. Fry, J. observed in that case :

B “When I find the word ‘assigns’ used in the power of sale as an alternative for Harrison, it is impossible that I can hold that it was sufficient for the defendants to go on serving Harrison alone after he had assigned his equity of redemption. The object of the proviso was that any assign might be at liberty to intervene and pay off the mortgage, and no one could be more interested than the second mortgagee in this right of intervention.”

C The only other point raised on behalf of the appellant was that he was entitled to the value of the improvements effected by him on the portion of the property purchased under the provisions of s. 51 of the Transfer of Property Act. In our opinion, that section can have no manner of application to the facts of this case. Under that section, a transferee of immovable property making any improvement therein, believing in good faith that he is absolutely entitled thereto, has a right to require the person subsequently evicting him therefrom on the strength of a better title, to have the value of the improvement estimated and paid or secured to him or to purchase his interest in the property at the then market value thereof. In this case, there can be no question of the appellant believing that he was absolutely entitled to the property. He knew that he was purchasing a small portion of it and that his vendors stood to lose the property unless they paid up the mortgage money on receipt of notice from the mortgagee. As already mentioned, the appellant wanted to safeguard himself against such an eventuality by the insertion of a clause in his deed of sale and the court directed the setting apart of Rs. 9,000 from out of the sale proceeds for the purpose. We do not think that the case referred to by the learned counsel *Narayana Rao v. Basavarayappa*<sup>(1)</sup> has any application to the facts of this case.

We would therefore dismiss the appeal with costs.

V.P.S.

*Appeal dismissed..*

(1) A.I.R. 1956 S.C. 727.