

**(1926) 01 MAD CK 0037**  
**In the Madras High Court**

A.G. Sambasiva Aiyar

APPELLANT

Vs

Venkatarama Aiyar and Others

RESPONDENT

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**Date of Decision :** 20-01-1926

**Acts Referred:**

Transfer of Property Act, 1882 — Section 100

**Citation :** 95 Ind. Cas. 447 : (1926) 51 MLJ 95

**Hon'ble Judges :** Ramesam, J

**Bench :** Division Bench

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**Judgement**

Ramesam, J.—The facts of this case may be stated as follows : One Perambala Chetti owed the present plaintiff a sum of money on a

promissory note, dated 13th November, 1913. The said Perambala Chetti sold some of his properties on 16th October, 1914 to Doraiswami

Aiyar, the father of the defendants, and left Rs. 560 out of the purchase money in the vendee's hands with instructions to remit the same to the

plaintiff towards his promissory note debt. Doraiswami Aiyar remitted Rs. 625 to the plaintiff on 11th December, 1925 but the plaintiff refused to

accept the amount on the ground that more sum than what was remitted was due. He afterwards instituted a suit against Perambala Chetti on the

promissory note and obtained a decree and in execution of that decree he attached the debt due to Perambala from Doraiswami Aiyar, consisting

of the unpaid purchase money with interest and purchased it himself. He now sues to recover the amount claiming also a lien on the suit properties.

Unless the lien is upheld the plaintiff's suit would be barred by limitation. The District Munsif held that as the amount was remitted by Doraiswami

Aiyar to the plaintiff and the plaintiff refused to accept it, it is not unpaid purchase money but it is only unaccepted purchase money and the plaintiff

is not entitled to the lien. With this view of the District Munsif, I do not agree, assuming that the allegations of the plaintiff are true. It is true that

Doraiswami Aiyar has followed the instructions of his vendor and has remitted the amount to the plaintiff. If Doraiswami Aiyar has not chosen to

inform the vendor of the fact that the amount was returned and of his readiness to pay it to the vendor himself, I do not see how it ceased to be

unpaid purchase money. I therefore think that the ground on which the Munsif decided against the plaintiff cannot be accepted.

2. On appeal, the District Judge confirmed the decree of the District Munsif on another ground. He refers to *Moti Lal v. Bhagwan Das* ILR (1909)

A. 443 and says that the present case is covered by that decision. He comes to the conclusion that the plaintiff is not entitled to any charge relying

on that judgment. I think the case has been entirely misunderstood by the learned District Judge. That case far from being against the plaintiff is in

his favour. That case only lays down that where a plaintiff attaches a portion of the purchase money due to his judgment-debtor, under a sale deed

by him, he cannot cause the property to be sold without previously bringing the debt to sale and purchasing it himself. The plaintiff in this case has

followed the course indicated in that decision. The learned vakil for the respondent concedes that the judgment of the District Judge in so far as it

rests on *Moti Lal v. Bhagwan Das* ILR (1909) A. 443 cannot be supported; but he seeks to support the decree on other grounds. His contention

is that the charge has not been validly transferred to the plaintiff. He relies on *Kunchithapatham Filial v. Palamalai Pillai* (1916) 32 M.L.J. 347 and

*Elumalai Chetti v. Balakrishna Mudaliar* ILR (1921) M. 965 : 41 M.L.J. 297. The former case only says that the charge must be assigned by a

proper conveyance. The latter case only decides that where a promissory note has been endorsed, the right to an equitable mortgage connected

with the promissory note does not pass by the endorsement. It seems to be now settled that the right to a mortgage can be transferred only by a

registered instrument [see *Balagurumurthy Chetty Vs. Ramakrishna Chetty and Others*, and *The Official Receiver Vs. Lakshman Aiyar*, ] : but I do

not think that these cases help the respondent. In the present case we have not got to do with a mortgage but only with a charge. "Charge" is

defined in Section 100 of the Transfer of Property Act thus:

Where Immovable property is by act of parties or by operation of law made security for the payment of money to another and the transaction does

not amount to a mortgage the latter person is said to have a charge on the property.

The distinction seems to be that whereas a mortgage amounts to a transfer of property, a charge does not amount to one. If there is no transfer of

Immovable property, the assignment of the charge need not be made by a registered instrument. The right of the debt being an actionable claim can

be transferred only by an instrument in writing u/s 130 of the Transfer of Property Act. In the present case we have an instrument in writing,

namely, the sale certificate issued by the Court. It is conceded by the learned vakil for the respondent that the sale-certificate need not be

registered with reference to the exceptions of Section 17 of the Registration Act. It seems to follow that the right to the charge passes along with

the debt. The learned vakil for the respondents relies on a dictum in Subbaraju v. Seetharamaraju ILR (1914) M. 283 at 286 and contends that

Section 8 of the Transfer of Property Act does not apply to Court sales. The passage relied on is not quite intelligible to me. I do not see why, u/s

8 of the Transfer of Property Act, the vendor's lien does not pass with the right to the money. It is true that Section 2(d) of the Transfer of

Property Act provides that the Act does not affect transfers by operation of law. But in the present case the contention of the appellant does not

seek to affect the effect of the execution sale. The effect of applying Section 8 is to strengthen the sale-certificate by transferring the lien along with

it. I am therefore of opinion that the right to the lien passed u/s 8 of the Transfer of Property Act along with the debt.

3. It is next contended that the execution proceedings which culminated in the sale-certificate to the plaintiff were irregular and cannot operate to

transfer the right to the lien in favour of the plaintiff. He relies on Order 21, Rule 54, Civil Procedure Code, and contends that the charge is

Immovable property within the meaning of that rule and not moveable property within the meaning of Rule 46. The appellant in reply relies on a

decision in Nataraja Aiyar v. The South Indian Bank of Tinnevely ILR (1911) M. 51 : 22 M.L.J. 105. That decision related to a mortgage and

was followed by the Allahabad High Court in Lal Umrao Singh v. Lal Singh I.L.R. (1934) A. 917. The respondent contends that these decisions

cannot be regarded as good law, after the other decisions above referred to by me which held that a right to a mortgage can be transferred only by a registered instrument being Immovable property. It is unnecessary for me to express any opinion here whether these decisions are correct in so far as they apply to mortgages. But I do not see any reason to doubt their correctness so far as they relate to charges which do not amount to mortgages or transfers of Immovable property.

4. I am therefore of opinion that the attachment was correctly effected under Order 21, Rule 46; but apart from this, I think it is not open to the defendant to raise questions relating to the regularity or otherwise of the execution proceedings taken by the plaintiff against his judgment-debtor.

The proceedings are final between the plaintiff and Perambala and whether they are regular or irregular, the title to the debt and the charge has passed to the plaintiff and it is not open to the defendant to question the plaintiff's title on the ground of mere irregularity in the execution proceedings.

5. The result is, I must hold, that the plaintiff is entitled to the lien on the facts alleged by him in the plaint and the grounds given by the Courts below for dismissing the suit cannot be supported. As the first Court did not go into the merits of the case but only tried two preliminary issues, the case will go back for being regularly tried on the merits.

6. The appeal is therefore allowed, the decrees of the Courts below are reversed, and the suit is remanded to the District Munsif's Court for disposal according to law.

7. The costs here and in the Lower Appellate Court will be paid by the respondents and the costs of the first Court will abide the result.

8. The Court-fee paid by the plaintiff here and in the Lower Appellate Court will be refunded to him.