

(1925) 12 MAD CK 0033
In the Madras High Court

Appana Prakasa Rao

APPELLANT

Vs

Yelamarti Ramanna and Others

RESPONDENT

Date of Decision : 26-12-1925

Acts Referred:

Citation : AIR 1926 Mad 1082 : (1926) 51 MLJ 358

Hon'ble Judges : Phillips, J;Odgers, J

Bench : Full Bench

Judgement

Phillips, J.—The first objection taken by the appellant (Ist defendant) is to the Subordinate Judge's finding that the plaintiff paid Rs. 2,000 in discharge of the mortgage, Ex. B, on the ground that the mode of payment proved is at variance with the mode set out in the plaint. It is alleged that the plaintiff put forward the case of cash payment and that the proof was "by adjustment of a debt". There is nothing in the plaint, nor in the sale-deed obtained by the plaintiff to justify the statement that cash payment and cash payment only was intended. The finding therefore must be accepted.

2. Accepting the finding, it is then argued that the plaintiff is not entitled to be subrogated to the rights of the mortgagee paid off by him. A long argument has been addressed to us as to the rights of a mortgagee and the assignee of a mortgagee to discharge an encumbrance or keep it alive, but in the present case it is unnecessary to enter into that question for the present case is concluded by authority. The facts of this case are very similar to those, in Dinobandhu Shaw Chowdhry v. Jogmaya Dasi (1901) 12 M.L.J. 73 In the present case the plaintiff took a sale of the suit property after it had been attached by the Ist defendant. He then discharged the encumbrance on the property. The property was subsequently sold and purchased by the Ist defendant. Inasmuch as the plaintiff's sale was after the attachment it is void as against the Ist defendant's interests u/s 64, Civil Procedure Code, and the plaintiff now only seeks to enforce the mortgage right of Rs. 2,000 which he discharged. In the case in Dinobandhu Shaw Chowdhry v. Jogmaya Dasi ILR 29 C. 154 the facts are almost the same

except that in that case the owner of the property had executed a second mortgage after the attachment and the consideration for the second mortgage, or a part of the consideration was the discharge of two earlier mortgages. It was held by their Lordships of the Privy Council that a mortgagee was entitled to be subrogated to the rights of the mortgagees who had been paid off. The principle is laid down as follows

When the owner of an estate pays charges on the estate, which he is not personally liable to pay, the question whether those charges are to be considered as extinguished or as kept alive for his benefit is simply a question of intention. The intention may be found in the circumstances attending the transaction or may be presumed from a consideration of the fact whether it is or is not for his benefit that the charge should be kept on foot.

3. Here, undoubtedly it is for the plaintiff's benefit that the charge should be kept on foot, and consequently this decision of the Privy Council is applicable to the present case. I may also mention that that case has been extended to the case of a sale by the Allahabad High Court in *Jamilunnissa v. Pitambar Das* (1913) 18 I.C. 704. The principle has also been followed by this Court in several other cases *Chama Swami and Another Vs. Padala Ananda and Another*, *Syamalarayudu v. Subbarayudu* ILR (1897) M. 143 The Subordinate Judge was therefore quite right in giving the plaintiff a charge on the property.

4. It is next contended that the charge should have been given not only on the suit property but on the other property also which was included in the mortgage, Ex. B. The question was not raised in either of the Lower Courts and it is a question which cannot be determined here without further trial. When the plaintiff's lien is enforced against the property in the hands of the 1st defendant it would then be open to the latter to put forward any claims to which he is entitled to for contribution from any other parties.

5. In the result the appeal is dismissed with costs two sets (Plaintiff and 7th Respondent)

Odgers, J.

6. I agree that the matter is concluded by the decision in *Dinobandhu Shaw: Chowdhry v. Jogmaya Dasi* ILR 29 C. 154 and *Jamilunnissa v. Pitambar Das* (1913) 18 I.C. 704.