
(1928) 02 MAD CK 0046
In the Madras High Court

A.R.M. Karuppan Chettiar and Another	APPELLANT
Vs	
Venkata Perumal and Others	RESPONDENT

Date of Decision : 27-02-1928

Acts Referred:

Transfer of Property Act, 1882 — Section 89

Citation : AIR 1929 Mad 465

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

Bench : Full Bench

Judgement

Phillips, J.—I agree that this appeal must fail. A case almost exactly on all fours with the present case was decided by a Bench of this Court in Venkataramana Reddi v. Rangiah Chetti AIR 1922 Mad. 249. Seeing that the question at issue arises u/s 89, T.P. Act, which has now been repealed by the CPC of 1908, the question is not likely to come up for decision except on very rare occasions and it is, therefore, unnecessary to discuss the law at length. I agree with Sadasiva Ayyar, J., in his judgment in Venkataramana Reddi v. Rangiah Chetti AIR 1922 Mad. 249, and am content to follow that decision.

2. On the question of limitation also I agree with my learned brother. The appeal accordingly fails and must be dismissed with costs. The memorandum of objections is dismissed.

Odgers, J.

3. In this case the plaintiff appeals from a decree of the Subordinate Judge of Chittoor wherein he decided that defendant 15 is entitled to priority with regard to item 16 in respect of his prior mortgage right to the extent of the decree debt due under the decree in O.S. No. 23 of 1891. Ex. 15 comprises the said item. It was purchased in O.S. No. 23 by a Court purchaser from whom defendant 15 acquired it. The plaintiff in the case was a puisne mortgagee and not a party to O.S. No. 23. The mortgage in question was dated 1891. The learned Subordinate Judge distinguishing the case of Het Ram v. Shadi Ram AIR 1918 P.C. 34, and

relying on the decision in *Gokal Das Gopal Das v. Perumal Premasukhdas* [1884] 10 Cal. 1035, *Umeshl Chander Sircar v. Zahir Fatima* [1891] 18 Cal. 164 and *Venkataramana Reddi v. Rangiah Chetti*, has decided that defendant 15 is entitled to priority as stated. The question before us has been argued as purely one of law on the decisions. Mr. Somayya for the plaintiff does not contend that he has any merits, nor is it apparent why the appellant should now acquire better or fresh rights from the omission to make him a party to O.S. No. 23 of 1891. The question is, therefore, whether the purchaser in Court auction of the mortgage right is entitled to set that up as a shield against the puisne mortgagee who was not made a party to the suit on the mortgage. One thing of course is perfectly clear and that is not being a party the plaintiff's rights cannot be worse than they would have been had he been duly arrayed as a defendant in that suit. But he insists that they are better owing to the effect of the decision in *Het Ram's case* AIR 1918 P.C. 34. The matter falls u/s 89, T.P. Act and he relies on the words in Section 89 (now altered and transferred to the Civil Procedure Code):

and thereupon the defendant's right to redeem and the security shall both be extinguished.

4. These words have given rise to much discussion and the learned commentators in *Shephard and Browns'* Transfer of Property Act note thus:

Without getting rid of the first mortgage by payment the second mortgagee can do nothing against the purchaser and therefore the first mortgage is said to be a shield in the hands of the purchaser and this is so notwithstanding the last sentence of Section 89.

5. In the Madras case referred to, the learned Judges say that the presumption is that the anterior encumbrance enures to the benefit of the party making the payment it is for his benefit so to treat it. It was contended in that case that the effect of the words in Section 89 was to reduce the parties to the position of parties to a simple money decree. As to this the learned Judge (*Sadasiva Ayyar, J.*) says:

So to read the provision would completely upset one of the main principles underlying the law of mortgages that the effect of a sale in execution of a mortgage decree is to vest in the purchaser at such sale the property as it stood at the date of the mortgage and therefore free from that and all subsequent incumbrance.

6. The question is whether under the decision in *Het Ram's case* that protection has gone. There the prior mortgagee brought a suit on the mortgage and obtained a decree absolute for sale under the Transfer of Property Act. The suit was brought only against the remaining mortgagee, the second mortgagee not having been made a party. Their Lordships of the Privy Council point out that "the second mortgagee was not bound by the decree for sale" and they go on to consider the last sentence in Section 89 and say that it means:

that on the making of the order absolute the security as well as the defendant's right to redeem are both extinguished and that for the right of the mortgagee under his security there is substituted the right to sale conferred by the decree.

7. The distinguishing feature in *Het Ram's* case is that:

the decree became inoperative under the Limitation Act and it therefore followed that the title of the mortgagee 2 remained as the only encumbrance prior to the title of the appellant as owner of the equity of redemption.

8. Nothing is said by their Lordships which would lead to the conclusion that had the decree remained in force, the first mortgagee would have been debarred by the words of the section from setting it up as a shield against a puisne encumbrancer and as pointed out by Sadasiva Ayyar, J., in *Venkataramana Reddi v. Rangiah Chetti*, if their Lordships intended this result it would have entailed the overruling of several of their own prior decisions to which no reference is made in the judgment. A subsequent case in the Privy Council is *Matru Mal v. Durga Kunwar* AIR 1920 P.C. 79, which was a case in which the second mortgagee having been omitted "from the first mortgagees suit afterwards sued on her mortgage and it was held that:

the amount to be paid to the second-mortgagee was to be calculated on the basis of the decree and not with regard to the amount due on the prior mortgage.

9. *Het Ram's* case, was followed in so far as it held that the effect of the words in Section 89 was to transform the mortgage right into the right under the decree for sale. In *Sukhi v. Ghulam Safdar Khan* AIR 1922 P.C. 11, *Het Ram's* case was relied on for the appellant and their Lordships explain that:

that case is based on two points namely, that the decree was useless in respect of limitation and that the second mortgagee had not been impleaded,

10. They say:

Although the first point has no application to this case, the second has. But the second proposition which was absolutely necessary for the judgment it (i.e. in *Het Ram's* case, was that the mortgage was gone for ever so soon as the decree of sale was obtained, and that was based on the express words of Section 89, T.P. Act.

11. Their Lordships advert to the fact that *Vanmikalinga Mudali v. Chidambaram Chetty* [1906] 29 Mad. 37, was not cited in the arguments in *Het Ram's* case and they held that as the case before them was brought under the provisions of the Code and not u/s 89, T.P. Act:

the law remains as it certainly was before the Transfer of Property Act, namely, that an owner of a property who is in the rights of a first mortgagee and of the original mortgagor as acquired at a sale under the first mortgage is entitled to set up the first mortgage as a shield against the puisne encumbrancer.

12. The only words in the judgment of their Lordships which might help the appellant in this case are:

Now, the words being gone, their Lordships feel no difficulty in holding that the law remains as it certainly was before the Transfer of Property Act.

13. The question is whether from these words we are to gather again that they meant to overrule the course of decisions and to say that under the Transfer of Property Act, it was perfectly clear that no such protection was intended to be afforded to the first mortgagee. Reported cases on this point are not numerous and the point cannot now arise. The period during which it could so arise was from 1882 to 1908. There is, however a case which has already been referred to, which is in my opinion on all fours with the present and that is Venkataramana Reddi v. Rangiah Chetti. Sadasiva Ayyar J., in a very exhaustive judgment comes to the conclusion that notwithstanding the fact that the prior mortgagee held a decree on his mortgage and sold the property in execution thereof it was open to the purchaser to hold his rights under the prior charge as a shield against the puisne mortgagee in a suit by the latter to enforce his mortgage. The learned Judge quotes from a judgment of K. Srinivasa Ayyangar, J., in Muthammal v. Razu Pillai [1918] 41 Mad. 513 to the following effect:

A mortgagee who sues for the sale of the secured properties, if he succeeds, gets the title of the mortgagor as it stood on the date of his mortgage or transfers that title to the purchaser free from all interests or liens subsequently created by the mortgagor, provided he makes the owner of such interests or liens parties to the suit, but if he omits to make any of them parties, their rights or liabilities are not affected.

14. The learned Judge examines Set Ram's case and observes that the defendant was defeated on the ground that:

not only was his right under the first mortgage substituted by his rights as holder of a mortgage decree for sale which he had obtained and by its extinction u/s 89, T.P. Act, but that even the substituted rights under the decree had been extinguished by limitation and hence he had no rights at all to hold up as a shield.

If Set Ram's case is intended to decide that where substituted rights under the decree had become converted into possessory rights vested in a purchaser in Court auction sale held in execution of the decree the latter could not utilise such rights as a shield, the Privy Council must have intended to overrule numerous cases decided by themselves,

in which the contrary is distinctly held. The learned Judge infers from the fact that no reference whatever to such cases appears in the judgment that the decision must be confined to cases where the substituted rights under the decree had also been destroyed without being converted into other rights e.g., by the operation of the Limitation Act. I see no good reason for not following the carefully-reasoned judgment of the learned Judge with whom Spencer, J., agreed

especially, as it seems to me that there is no reason for saying that a decree cannot form the basis of a right of subrogation. Why, if a prior mortgagee acquires rights of his mortgagor privately i.e., without a suit, he is entitled to hold up his paid-off mortgage as a shield but he is disentitled from doing so when he has been compelled to enforce his remedy in Court of law is not clear, and in my opinion, there is no basis for the distinction. I therefore hold that the appellant fails and that the decision of the Subordinate Judge was right on this point.

15. The only other argument which was somewhat faintly argued was that the defendants-respondents' remedy, i.e., to set up the paid-off mortgage as a shield was time barred. Reference may again be made to Venkataramana Reddi v. Rangiah Chetti where the contrary is distinctly held and the only authority against this case is said to be contained in Kotappa v. Raghavayya, AIR 1927 Mad 631 . If that decision which is apparently based upon the Privy Council decision in Gopi Narain Khanna v. Bansidhar [1905] 27 All. 325 means that a defendant cannot set up his paid-off mortgage except within 12 years from the date of the mortgage I must respectfully disagree. I am not aware of any general course of decisions which applies the law of limitation to a defence and moreover it appears that the Privy Council case was a decision as to a plaintiff and not a defendant. If therefore, Kotappa v. Raghavayya, AIR 1927 Mad 631 holds to the contrary (and, it does not appear that Venkataramana Reddi v. Rangiah Chetti was quoted to the Bench) I would respectfully disagree and hold that the defendant is not barred by limitation. In "my opinion therefore the appeal fails on both points and must be dismissed with costs. Memorandum of objections is also dismissed.