

(1934) 10 MAD CK 0065
In the Madras High Court

B. Raghavachari and Others

APPELLANT

Vs

Pelletti Venkatanarayana Reddi and Another

RESPONDENT

Date of Decision : 29-10-1934

Acts Referred:

Transfer of Property Act, 1882 — Section 82

Citation : AIR 1935 Mad 456 : (1935) 41 LW 416

Hon'ble Judges : Madhavan Nair, J

Bench : Division Bench

Judgement

Madhavan Nair, J.—The defendants are the appellants. The facts of the case are as follows: The suit properties mentioned in Schedules A and B to the plaint belonged to one Ummer Beg Sahib. He mortgaged them to one Venkatarama Beddi on 2nd January 1900 and subsequently sold Schedule A properties to the father of the defendants. On 14th July 190? Schedule B properties were usufructuarily mortgaged by Ummar Beg Sahib to the plaintiff. Venkatarama Reddi instituted a suit O.S. No. 190 of 1908 to enforce his mortgage impleading Ummar Beg Sahib, the father of defendants 1 to 3" the plaintiff herein, and some others and obtained a decree in execution of which he brought the properties to sale. The" defendants objected to the order in which the properties were sought to be sold and contended that Schedule A proper, ties which they purchased should be sold last. The Court did not grant their prayer, but ultimately the High Court in C.M.S.A. No. 11 of 1922, see Raghavachariar v. Krishna Reddi 1924 Mad 509 granted the defendants prayer and ordered that the Schedule B properties should be first sold in auction and that in case the decree amount was not. thereby satisfied the Schedule A properties. be then sold, on the ground that the equities involved in the case were in favour of the defendants whose father had purchased the properties without notice of the mortgage while the plaintiff who was a relative of the owner knew all about it. The plaintiff to avert the sale of his properties paid the amount of the mortgage decree and instituted the suit out of which this second appeal arises-against the defendants, the owners of Schedule A properties, for contribution in respect of the debt discharged by the plaintiff.

The District Munsif dismissed the plaintiff's suit. In appeal his decision was set aside.

2. In this second appeal three grounds. have been raised by the learned Counsel on behalf of the appellants: (1) the plaintiff being a mortgagee cannot claim contribution u/s 82, T.P. Act: (2) the plaintiff's right to contribution if he has any is barred by the decision of the High Court in Order M.S.A. No. 11 of 1922; (3) the plaintiff claiming the right through the mortgagor cannot have a higher right than himself, he having sold the properties to the defendant's father free from encumbrance. Of these grounds 2 and 3 do not seem to have been raised in the lower Court. I will now deal with these grounds separately. Section 82, T.P. Act, which embodies the rule relating to contribution is as follows:

Where several properties, "whether of one or several owners, are mortgaged to secure one debt such properties are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, after deducting from the value of each property the amount of any other encumbrance to which it is subject at the date of the mortgage.

3. It is argued that under this section it is only an owner of properties that can claim the benefit of contribution and that the plaintiff being only a mortgagee as distinguished from a full owner cannot claim that right. The words of the section do not support this contention, and no decision supporting it has been cited. On the other hand the cases cited by the respondents' learned Counsel show that such a right can be claimed by the mortgagee. *Gulam Hazarat v. Gobhardan Das* (1911) 33 All 387 is a direct decision on the point, though there is no discussion of the question in the judgment as apparently the point was never disputed. The suit in that case was brought by a subsequent mortgagee claiming the right of contribution and he was allowed the benefit of that right. In *Fakir Chand v. Aziz Ahamad* 1932 PC 74 the Privy Council have recognized the right of an assignee from the mortgagee to claim contribution. It is said by the appellant's learned Counsel that in the light of the facts as mentioned in the judgment of the High Court in that case reported in *Aziz Ahmed Khan v. Chhote Lal* 1928 All 241 the suit was brought by a person claiming the rights of the owner and not that of a mortgagee; but the judgment of the Privy Council does not support this statement. In *Sesha Iyer v. Krishna Iyengar* (1901) 24 Mad 96 the suit was by mortgagees for contribution. The learned Judges say having regard to the facts of the case that if the sale of the properties had not taken place and they had paid the money themselves they; \$2 would be entitled to claim contribution. They observed as follows:

In the present case the plaintiffs, who certainly cannot be in a better position than they would be if they had simply bought part of the mortgaged property, subsequently sold under Eangayya Goundan's decree had the opportunity, and they might, by paying off the debt and saving the property from sale, have acquired a right of contribution secured by a lien on the; other property. They would then have stood in a position analogous to that of one of several

mortgagors who has redeemed the whole property and claims to take advantage of Section 95 of the-Act. But the plaintiffs did nothing and therefore no right of contribution arose and the other property stood free from any lien.

4. The position that sale would affect the question has been held to be wrong in *Ramabhadrachar v. Sreenivasa Iyengar* (1901) 24 Ma 85. The decision in *Pattamal v. Ramayya Pillai* 1932 Mad 415 also lends support to the contention of the respondent. In English law a subsequent mortgagee's right, to contribution seems to be undisputed; see *Coote on Mortgages* at p. 811, Vol. 1 Bdn.9, 1927 and also *Fluit v. Howard* (1893) 2 Ch 54 On the whole I am inclined to think that the plaintiff in this case though only a mortgagee and not a purchaser of the properties, is entitled to claim contribution. The cases cited by the respondent support that view though it must be said, that the question as such has not been discussed in any of these cases.

5. The next question is, is the plaintiff's, right to contribution barred by the decision of the High Court in C. M. S. A. No. 11 of 1922. Under that decision the order in which the properties were to be sold was settled. It is argued that if effect is given to it plaintiff's property will be sold first and if the decree amount is realized from that sale there will be no need to sell the properties of the defendants, and by allowing contribution the order of the High Court is nullified.. The respondent argues that the question whether he is entitled to contribution.", was not raised or decided in that case and that decision cannot in any sense be construed as depriving him of that right which is vested in him in law. The short question is whether the plea of the plaintiff-respondent that he is entitled to contribution is barred by the principle of *res judicata*. In *Magniram v. Mehdi Hossain Khan* (1904) 31 Cal 95 where the same question was raised in similar circumstances the question was answered in the negative. The "previous decision of the High Court only settled the order in which the properties were to be sold. That does not necessarily preclude

the determination of the question whether in the event of such a sale satisfying the whole of the mortgage debt the plaintiff is or is not entitled to contribution.

6. It is true that the plaintiff's properties were not sold as he averted the sale by paying up the decree debt, but that does not affect the application of the (principle. It was not necessary for the Court in the previous litigation to determine the question of contribution, none of the parties having asked the Court to (determine it, and as a matter of fact the judgment does not show that it was "determined by the Court. That being ;so, it must be held that the previous decision of the High Court does not in any way bar the claim to contribution now put forward by the plaintiff-respondent. [The appellants in support of their plea relied upon a case in *Satya Kripal Banoopadhyaya v. Gopi Kishore Mandal* 6 CWN 583 which at first sight would seem to support them. But the facts show that the mortgage decree in the suit which was held to constitute a bar to the claim of contribution, incorporated an arrangement made by the parties by which the incident of the debt was thrown primarily on some of the

properties and the other properties were only liable if the debt was not realized by the sale of these properties. Although all the properties mortgaged may originally be equally liable for the mortgage debt, it is clear that the liability may be altered by an arrangement made between the parties; and if that arrangement is incorporated in the decree, then so long as the decree exists the claim for contribution cannot be pressed by the party affected by it. In my opinion this is all that has been decided in *Satya Kripal Banoopadhyaya v. Gopi Kishore Mandal* 6 C.W.N. 583 and that case is therefore distinguishable from the case before us.

7. The third point raised must also be disallowed as here again the point was not raised up till now and we have not before us the facts necessary to decide it. The learned Counsel for the appellants assumes that the property was sold to them by the mortgagor free from encumbrances. Even the sale-deed has not been filed in the case and I am not in a position to decide whether it was so or not. As the necessary facts are not before me I must disallow the appellants from raising this contention. In the result the second appeal is dismissed with costs.