

(1922) 09 MAD CK 0019
In the Madras High Court

C.S. Vadamalai Pillai and Others

APPELLANT

Vs

P. Subramania Chettiar and Others

RESPONDENT

Date of Decision : 15-09-1922

Acts Referred:

Citation : AIR 1923 Mad 262 : 71 Ind. Cas. 130 : (1922) 16 LW 936

Hon'ble Judges : Spencer, J;Devadoss, J

Bench : Division Bench

Judgement

Spencer, J.—This suit was brought on the strength of an equitable mortgage made by 1st defendant in favour of the plaintiff. Defendants Nos. 2 to 6 are the sons of first defendant. Defendants Nos. 7 and 8 are puisne mortgagees. Defendants Nos. 1, 2 and 5 are now dead and defendants Nos. 3, 4 and 6 prefer this appeal.

2. The evidence on record shows that the plaintiff was lending money to the 1st defendant in a series, of transactions commencing from the 24th of August 1907. Every time that accounts were settled between the parties a promissory note was executed. On the 13th of October 1913 the 1st defendant deposited title-deeds of landed property to secure a debt of Rs. 10,900 carrying interest at 12 per cent due on the 12th October 1913. On the 1st of October 1912 there was a consolidation of intermediate loans and on the 4th October 1913 there was a fresh consolidation for which a promissory-note, Exhibit C, for Rs. 13,900 was executed. This was followed, on the 7th of October 1913 by a letter, Exhibit E, giving particulars of the title-deeds deposited for the debt of Rs. 13,900 Exhibits C(1) and C(2) are promissory-notes for the interest that subsequently accrued. They are dated 17th February 1915 and 20th September 1915 respectively. Finally, Exhibit E(2), a letter dated the 20th September 1915, was written by the 1st defendant to the plaintiff stating that he consented to the title-deeds and other documents already deposited being held as security for interest amounting to Rs. 812 and odd lent upon a promissory-note of the same date, viz., Exhibit C(2). The deposit of title-deeds having been made in the Presidency Town of

Madras was quite regular and valid according to Section 59 of the Transfer of Property Act.

3. In appeal the following contentions have been raised. First, that the loan is not true, that the transactions between the plaintiff and the 1st defendant were brought about in order to shield the property from his unsecured creditors and that being pressed by them he filed a petition to be declared an insolvent on the 23rd of March 1916. Secondly, the son's interest is not affected by this equitable mortgage, as the father did not contract it for an antecedent debt in the sense that these words have been used in recent Privy Council decisions. Thirdly, as the father purported to be dealing with his own property, he did not make the mortgage in his capacity of manager of the joint family and, therefore, it cannot bind the son's share. Fourthly, if the mortgage is partially effective over the father's interests, the plaintiff can only proceed against the son's shares after exhausting his remedies against the father's share. Fifthly, Exhibits E and E(2), which are letters referring to the deposit of title-deeds, are invalid for the purpose of creating a mortgage as they have not been registered. In the lower Court an attempt was made to prove that the debts were incurred for illegal and immoral purposes. Mr. A. Krishnaswami Aiyar for the appellant frankly stated that he could show that the 1st defendant was leading an immoral life, but he admitted that he could not connect any particular debt with immorality. Therefore, the defence which formed the subject of the 4th issue in the lower Court has not been pressed in appeal.

4. On the first point it is not necessary to say much. We have been referred to all the evidence on the subject to prove or disprove the existence of debts. The Subordinate Judge observed in paragraph 11 of his judgment that he was convinced from the documentary evidence beyond a shadow of doubt that the plaintiff's accounts were correct, that the promissory-note s were executed for value and that the plaintiff's claim was true. Before coming to this conclusion he referred to the entries in the plaintiff's account-books, Exhibits A and 13 series, to the correspondence between the parties, Exhibit K series, to the counterfoils of receipts for payment of interest, Exhibit G series, and to the entries in the despatch, register, Exhibit H series; and we have compared some of the counterfoils of these receipts with the entries in Exhibit H to prove that they were received by the 1st defendant and we find that they correspond. The fact that interest was paid from time to time upon these loans is a strong circumstance to prove the existence of the loans. It is argued that the plaintiff having been declared insolvent in 1904 could not have had means to lend so much money to the 1st defendant. But the plaintiff in his evidence stated that he received Rs. 20,750 between 1st November 1906 and 6th September 1912 from his father who was Receiver of several estates under this High Court. This statement is borne out by the entries in his accounts, Exhibit A series, and by the statement of his 3rd witness who knows that plaintiff's father gave him about Rs. 20,000, as he used to get the cheques cashed at the Bank for the plaintiff. The absence of correspondence between the parties from 1916 to 1918 and the delay in

instituting this suit is explained by the fact that plaintiff Was engaged in prosecuting a suit against the 1st defendant upon a registered mortgage on the 1st defendant's house and alter he got Rs. 1,421 and odd through that suit, as the; accounts show, as 19th April 1917, he then brought this suit finding that the 1st defendant would not discharge his debt without being put into Court. The plaintiff and the 1st defendant were friends in their youth, as the plaintiff was cashier and the 1st defendant was Dubash's clerk in Messrs. Carl Simon and Co.'s office. The suggestion that the 1st defendant deposited these title-deeds with the plaintiff in order to shield his property from creditors is rendered improbable by the fact that the 1st defendant did not try to get back the documents after the pressure from creditors had diminished. It is very unlikely that the 1st defendant would have left documents of title for a number of years even with a friend without making any effort to recover them unless they were "deposited as security for a loan. Exhibits E and E(2) show that the plaintiff's case is true as put forward in his plaint, that these title-deeds were deposited as collateral security for promissory-notes executed by the 1st defendant. There is evidence that the 1st defendant had heavy debts to discharge in consequence of his purchase of lands in the South Arcot District. Also D. W. No. 4 states that he spent Rs. 5,000 on a (sic) ceremony. There is no reason to doubt the fact of his having been indebted at the time when he was leaking these loans.

5. The respondent's answer to the second objection is three-fold; first, he contends that the mortgage properties were in fact the self-acquisitions of the 1st defendant and, therefore, no question arises as to the existence of an antecedent debt. Secondly, he relies on the personal covenant given by the 1st defendant at the time when the mortgages were created, if it be held that the properties mortgaged were really ancestral properties; and thirdly, he has referred to the documentary evidence to show that in each case promissory-notes evidencing the father's liability, existed before the equitable mortgage on the family property was created. In the present case all the evidence is before us and upon that evidence it appears probable that the properties mortgaged were in reality the self-acquisitions of the 1st defendant, Although when the 6th issue was before the lower Court, the Subordinate Judge observed that No. attempt was made by the plaintiff to prove that the properties in the plaint schedule were the self-acquisitions of the 1st defendant, as alleged in the plaint and as recited in Exhibit E, Exhibit E clearly states that the title-deeds, a list of which is contained in the letter, related to self-acquired Immovable properties, and there is no particular reason why the 1st defendant should have made this statement if, in fact, it was not true. There is evidence that he was earning from Rs. 300 to 400 a month when he was Dubash to Haji Jamal Mordeen and Co. and Messrs. Wilson & Co. and that he was living on the rice which he got from his village lands (vide statement of D. W. No. 1). On the other hand, it has not been proved that a sufficient nucleus of ancestral property existed, out of the income of which he might have acquired the lands which he subsequently mortgaged. The only family property which he appears to have possessed was survey No. 61 valued at

Rs. 200 and a house site No. 44 upon which there was a debt of Rs. 500. Exhibit E contains a reference to item No. 7, a property worth Rs. 800, which was divided between the 1st defendant and his brothers, and Exhibit D(6) is a deed of exchange relating to a house site worth Rs. 200. It has not been shown that any other ancestral properties existed and thus by a process of exclusion it may be inferred that there was no source of income for the purchase of property of the value of the property concerned in this suit. On the 6th issue, I, therefore, find that the plaint properties were self-acquisitions of the 1st defendant.

6. On the second part of this issue I am of opinion that even if they were not self-acquisitions, the mortgage is binding on the shares of defendants Nos. 2 to 6. The respondent's Pleader relies on the personal covenant of the 1st defendant contained in the mortgages and he has argued that, if there is such a personal covenant, it will form a basis for a mortgage being effected by the manager of a Hindu family so as to bind the interests of the other members. In *Sahu Ram Chandra v. Bhup Singh* 39 Ind. Cas. 280 : 44 I.A. 126 : 21 C.W.N. 698 : 1 P.L.W. 557 : 15 A.L.J. 437 : 19 Bom. L.R. 498 : 26 C.L.J. 1 : 33 M.L.J. 14 : (1917) M.W.N. 439 : 22 M.T. 22 : 39 A. 437 : 6 L.W. 213 (P.C.), their lordships of the Privy Council laid down that to effectively bind the father's issue there must be "an obligation not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate," and in the subsequent case *Chef Ram v. Ram Singh* 67 Ind. Cas. 569 : 49 I. A. 228 : 43 M.L.J. 98 : 3 P.L.T. 363 : 31 M.L.T. 50 : 16 L.W. 89 : (1922) M.W.N. 455 : 4 U.P. L.R. (P.C.) 64 : 44 A. 368 : 3 P.L.R. 1922 : 24 Bom. L.R. 123 : 27 C.W.N. 150 : (1922) AIR (P.C.) 47, their Lordships say that the debt must be "disconnected with the mortgage in fact as well as in time." I do not consider that a personal covenant given by a father at the time of entering into a mortgage could be described as "disconnected in fact as well as in time." Even if the personal covenant be contained in an earlier mortgage, as that earlier mortgage is an alienation and not a debt, there is no antecedency on the principle of *Chel Ram's* case 67 Ind. Cas. 569 : 49 I. A. 228 : 43 M.L.J. 98 : 3 P.L.T. 363 : 31 M.L.T. 50 : 16 L.W. 89 : (1922) M.W.N. 455 : 4 U.P. L.R. (P.C.) : 44 A. 368 : 3 P.L.R. 1922 : 24 Bom. L.R. 123 : 27 C.W.N. 150 : A.I.R.(1922) (P.C.) 47. Thus, whether the personal Covenant be contemporaneous or previous if "it is part of a mortgage it is not antecedent in the legal sense and thus *Ram Dei v. Suraj Bakhsh* 60 Ind. Cas. 177 : 23 O.C. 204 : 7 O.L.J. 509 : 2 U.P.L.R. (J.C.) 156, a decision of the Oudh Judicial Commissioner's Court given before the Privy Council had decided *Chet Ram v. Ram Singh* 67 Ind. Cas. 569 : 49 I. A. 228 : 43 M.L.J. 98 : 3 P.L.T. 363 : 31 M.L.T. 50 : 16 L.W. 89 : (1922) M.W.N. 455 : 4 U.P. L.R. (P.C.) 64 : 44 A. 368 : 3 P.L.R. 1922 : 24 Bom. L.R. 123 : 27 C.W.N. 150 : (1922) AIR (P.C.) 47 does not appear to be sound law.

7. Whether there is an antecedent obligation dissociated in time and in fact from the sale or mortgage in any particular case is a question of fact. In the present case, the accounts produced by the plaintiff Show that money was first advanced and afterwards security was taken. The learned Subordinate Judge in paragraph

18 of his judgment has referred to the fact that the promissory-notes, which might have been enforced against the 1st defendant, who executed them, were in existence before the title-deeds were deposited under Exhibits E and E(2). Exhibit C, which consolidated previous debts upto 1913, was dated the 4th October 1913. Exhibit E, the letter referring to the deposit of title-deeds, was dated three days later.

8. In *Ramachandra Row v. Sesha Aiyangar* 3 M.L.J. 225, it was held that a promissory-note did not lose its character of being a negotiable instrument by the fact that the title-deeds were deposited as a collateral security. In my opinion, the debts were, in the present case, sufficiently dissociated in time and in fact from the mortgages to constitute antecedent debts. It follows that the suit mortgage is valid against the interests of defendants Nos. 2 to 6 if they had any interest in the mortgage properties.

9. It is unnecessary to discuss the fourth point, as I have found that the son's interests are liable upon the footing of the suit transactions being mortgages.

10. On the third point the appellant's learned Vakil quotes the case of *Balwant Singh v. Rev. Rockwell Clancy* 14 Ind. Cas. 629 : 34 A. 296 : (1912) M.W.N. 462 : 11 M.L.T. 344 : 9 A.L.J. 509 : 15 C.L.J. 475 : 16 C.W.N. 577 : 23 M.L.J. 18 : 14 Bom. L.E. 422 : 39 I.A. 109 (P.C.). In that case the mortgage made by *Deoraj Singh* was held to have been made not as manager of the family or as representing *Maharaj Singh* who was a minor, and, therefore, the mortgage-deed was void against *Maharaj Singh* and his interest in the estate. In the present case the 1st defendant did not purport to be mortgaging only his own share in the lands described in Exhibit E, and, therefore, it must be taken that he mortgaged such interest as he was capable of mortgaging thereby. If a father transfers property and it is clear that he intends to part with all the interest he possesses in any capacity in the property, a recital in the deed as to its being self-acquired property is not sufficient to invalidate an otherwise proper transaction. Vide, *Sabapathy Chetty v. Ponnusawmy Chetty* 28 Ind. Cas. 365.

11. The last point relates to the registration of Exhibits E and E(2). In *Chunilal Someshvar Bhatt v. Vithaldas Karsandas* 68 Ind. Cas. 1005 : 24 Bom. L.R. 502, it was held that a document creating a charge by deposit of title-deeds required registration and could not take effect if unregistered. So far as this case decides that a writing which only gave the plaintiff a right to obtain a mortgage-deed should be duly registered, I am not inclined to follow it, as no reference has been made to the terms of Section 17(g)(v) of the Registration Act, which exempts from registration, a document which does not of itself create a right over Immovable property, but merely creates a right to obtain another document which will create or extinguish such right or interest. It is clear from a recent decision of the Privy Council in *Rajangam Ayyar v. Rajangam Ayyar* 69 Ind. Cas. 123 : 31 M.L.T. 136 : 4 U.P.L.R. (P.C.) 85 : 16 L.W. 615 : AIR (1922) (P.C.) 266 that such a document would not require registration and would not be bad for want of registration. In *Muthiah Chetty v. Kothandaraswami Naidu* 35 Ind. Cas.

864 : 31 M.L.J. 347 : (1916) 2. M.W.N. 221 : 4 L.W. 472, it was pointed out that, in cases of equitable mortgages, the act of deposit of title-deeds created a mortgage and not any letter accompanying, preceding or contemporaneous with the deposit which did not of itself purport to create a mortgage right. Bhairab Chandra Bose v. Anath Nath De 57 Ind. Cas. 686 : 31 C.L.J. 375 : 24 C.W.N. 599, is another case in point. There it was held, quoting the words of Couch, C.J., in Kedamath Dutt v. Sham hall Khettry 20 W.R. 150 : 11 B.L.R. 405, that if there is a memorandum accompanying an equitable mortgage and if without such a memorandum there would have been a complete equitable mortgage by the deposit of the deeds, the memorandum in such a case is only evidence of the fact of the deposit which might be proved by any other evidence. In Exhibits E and E(2) there are no words purporting to pass an interest in Immovable property and, therefore, I hold that they do not require registration.

12. The appeal thus fails on all points and is dismissed with costs of 1st respondent.

13. Time for redemption is extended for six months from this date.

14. Interest to be at the contract rate till the date fixed for payment and six per cent, thereafter.

Devadoss, J.

15. Defendants Nos. 3, 4 and 6 are appellants. The plaintiff brought a suit, Original Suit No. 27 of 1919, in the Additional Subordinate Judge's Court of Cuddalore against the first defendant and his sons, defendants Nos. 2 to 6, and two other persons for a mortgage-decree in respect of a sum of Rs. 19,000 and odd due on a mortgage by deposit of title-deeds. The 1st defendant was ex parte and died pending this appeal, defendants Nos. 2 and are dead. Defendants Nos. 3, 4 and 6 pleaded that the debt was not contracted for purposes binding on the other members of the joint family than the 1st defendant; that the 1st defendant had no power to alienate family properties for his own extravagant purposes, that the letter by which the title-deeds were deposited required registration, that no mortgage-decree could be given in favour of the plaintiff and that the suit should be dismissed as against defendants Nos. 2 to 6. The 7th defendant a puisne mortgagee, filed a written statement in support of the defence of defendants Nos. 2 to 6. The 8th defendant, another puisne mortgagee, also filed a similar written statement. The Additional Subordinate Judge held that the amount sued for was really due to the plaintiff, that the debts were contracted for purposes which could bind the other members of the joint family of which the 1st defendant was the managing member, that the letter evidencing the deposit of the title-deeds did not require registration and that the plaintiff was entitled to have priority over the 7th and 8th defendants and gave a decree to plaintiff. Defendants Nos. 3, 4 and 6 have preferred this appeal.

16. The first point raised by the appellants is that no money was due to the plaintiff and that there was no mortgage in his favour but that some documents

were brought into existence for the purpose of saving the 1st defendant's property from his creditors and that Exhibit C, the promissory-note evidencing the loan, is a nominal or sham transaction.

17. The 1st defendant filed his petition in insolvency on the 23rd of March 1916. Before he filed his petition a decree was obtained against the 1st defendant by the plaintiff in the City Civil Court on a registered mortgage dated the 12th of October 1907 and the decree amount was realised by sale of a house in George Town. The 1st defendant got into difficulties and was obliged to file his schedule in insolvency in 1916. The plaintiff and the 1st defendant are members of, different castes and there is no evidence to show that the plaintiff was interested in helping the 1st defendant to cheat his creditors. The plaintiff's case is supported by his accounts, a letter, delivery book, press copy-books, and number of letters written to the 1st defendant by the plaintiff and by the 1st defendant to the plaintiff. It was conceded by Mr. Krishnaswami Ayyar who appeared for the appellants that, if these documents were held to be genuine, then the plaintiff's case as regards the loan must be held to be proved. But he attacked the capacity of the plaintiff to lend a large sum of money to the 1st defendant. The plaintiff became an insolvent in 1896 and he got his discharge in 1904, The plaintiff is the son of the Dewan Bahadur Ramaswami Chettiar, a very well-known man in Madras. There is satisfactory evidence on record to show that in 1904 Ramaswami Chettiar gave large sums of money to the plaintiff wherewith the plaintiff carried on money-lending business. His account-books which are in Court appear to be genuine documents, and there is no reason why the plaintiff should have concocted elaborate accounts for the purpose of helping the 1st defendant in whom he was not interested in such a way as to make a man in the plaintiff's position get up forged documents and commit forgery. The letters, Exhibit K series, show clearly that the 1st defendant often wrote letters begging for time and offering to pay the amount due to the plaintiff. Some of the recitals in Exhibit K series are supported by the entries in the account-books, as for instance, Rs. 300 which is mentioned in Exhibit K(31) was paid to the plaintiff and there is an entry to that effect; and in Exhibit K(20) the defendant says that he sent Rs. 100, in currency notes which amount also finds a place in the plaintiff's books. The Subordinate Judge had an abstract of the dealings prepared which he says he carefully compared with the original accounts, and that abstract shows that interest was paid from time to time by the 1st defendant on the amounts due by him to the plaintiff. The transactions began so far back as 1907. We find from the books that interest was paid month after month on the amounts due. The plaintiff's system of business was to collect interest monthly for which purpose he prepared every month an account showing the amounts of the interest due to him from his various constituents, and entered such amounts in a book of receipts and gave the receipts as soon as they were paid. The plaintiff has produced a number of books, Exhibit 1, series, containing counterfoils of the receipts for interest paid and there is no reason to doubt their genuineness or the entries relating to the 1st defendant. His despatch register, Exhibit H, shows

that the receipts for payment of interest and letters addressed to the 1st defendant were delivered to him and he has initialled in token of having received them. Exhibit H, which contains the signatures of numerous persons, could not have been fabricated recently either for the purposes of this case or for any other ulterior purpose. The sum of Rs. 13,900 evidenced by Exhibit C was not lent on one day but it was the balance found due on a settlement of accounts on the 4th of October 1913. The 1st defendant has not ventured into the witness-box to deny the plaintiff's claim, although he was said to have been living with his sons at the time when the trial went on in the lower Court. It is not suggested that his interests were adverse to those of his sons, and that was why he did not want to help the defendants. He evidently kept out of the way for fear of being confronted with the various documents to which he was a party. The Subordinate Judge has rightly come to the conclusion that the debt sued for is due and that Exhibit C evidences a real transaction.

18. The next point urged for the appellants is that Exhibit E, which was written about the time of the deposit of the title-deeds, speaks of the properties as the self-acquired properties of the 1st defendant, and that as the plaintiff took from the 1st defendant what he considered to be self-acquired properties, and as the 1st defendant did not purport to mortgage the properties as the father of the defendants Nos. 2 to 6 or the managing member of the joint Hindu family the 1st defendant's share alone is liable for the mortgage-debt and not the shares of his sons. It is true that Exhibit E says: "I leave with you herewith the title-deeds and other documents of some of my self-acquired Immovable properties situate in the village* * *."

19. Granting that the contention of the learned Vakil is correct, in view of my finding on issue No. 6 it would be unnecessary to consider whether the 1st defendant mortgaged the properties as the managing member of a joint Hindu family or as an individual member hypothecating his own share of the property. The Subordinate judge, for reasons which are not quite clear, says, in regard to Issue No. 6, viz, "Are the plaint properties the self-acquisitions of the 1st defendant, even if not, is the equitable mortgage not binding on the shares of defendants Nos. 2 to 6?" "No attempt was made by the plaintiff to prove that the properties of the plaint schedule are the self, acquisitions of the 1st defendant as alleged in the plaint and as recited in Exhibit E, and hence the first portion of the issue is found in the negative and against plaintiff." I cannot accept the finding of the Subordinate Judge in the light of the evidence that has been adduced. The 1st defendant got, by partition with his brothers in 1897, a piece of land worth Rs. 200 and a house worth Rs. 260 with, a debt of Rs. 500 to be discharged. It is admitted that the 1st defendant came to Madras and was employed in 1886 as clerk to the Dubash of Carl Simon Soehne, that for about 7 or 8 years from 1896 he v. as D abash to Messrs. Wilson & Co., that his income was from Rs. 300 to 400 a month and that he was earning about Rs. 100 a month till the date of his insolvency in 1956. It is contended by the appellants that the onus is upon the plaintiff to make out that the properties mortgaged to him are the self-

acquisitions of the 1st defendant and that he has not discharged the onus and that it cannot be said in the circumstances that the properties mortgaged are the self-acquisitions of the 1st defendant. The family property, which is said to be worth Rs. 300 in 1897, is said to be worth Rs. 800 in 1901. Whatever might have been the value of that plot of land, it could not have yielded any appreciable income from which it could be said that the plaintiff properties as well as other properties of the 1st defendant have grown up. The principle in all these cases is that if there is a large family nucleus and if the property in the possession of a member of the joint family can be traceable to the income of the family nucleus, such property would be considered joint family property till it is affirmatively shown that that property was acquired without the help of, and without detriment to, the family nucleus. The question of onus is not of much importance when all the evidence is before the Court. When it is found that the family nucleus is of such a character that it could not have yielded any appreciable income and when there is no proportion between the family nucleus and the fortune acquired in the course of a few years, the matter does not rest with mere presumptions alone. The Court has to see whether the acquisitions were made by a member unaided by the family nucleus. Mr. Mayne quotes with approval the observations of Grant, J., in *Gooroochurn Doss v. Goluckmoney Dossee* (1843) Fult 165 : 1 Ind. Dec. 743:

Where the property descended is incapable of being considered as the germ whose improvement has constituted the wealth ultimately possessed, this wealth must evidently be deemed acquired--an ancestral cottage never converted or capable of conversion to an available amount into money, in which the maker of the wealth had the trifling benefit of residing with the rest of the family when he commenced turning his industry to profit--so of other things of trifling nature.

20. (Mayne's Hindu Law, 8th Edition, page 363). In a recent case reported in *Akkaraju Narayana Rao v. Akkaraju Seshamma* 26 Ind. Cas. 33 : 27 M.L.J. 677, the learned Chief Justice and Seshagiri Tyer, J. quote with approval the observations of Chamier, J., in *Ram Kishen Das v. Tanda Mal* 10 Ind. Cas. 543 : 33 A. 677 : 8 A.L. 172, and lay down the law thus:

Under the Hindu Law mere living together of the members of a family will not make them joint owners of properties acquired by each individual member. There must have been a nucleus of ancestral property which was utilised for the purpose of making the subsequent acquisitions or the members must have thrown their joint earnings into hotch-pot with the intention of giving up their individual rights in them.

Chamier, J., examines all the previous rulings on the subject in *Ram Kishen Das v. Tanda Mal* 10 Ind. Cas. 543 : 33 A. 677 : 8 A.L. 172 and says that

there is no presumption that property found in the possession of any one member is joint family property unless it is shown that the family as such possessed at least some property.

In another place the learned Judge says that it is only when there is

Ancestral property by means of which other property may have been acquired, then it is for the party alleging self-acquisition to prove that it was acquired without any aid from the family estate. We entirely agree with these propositions.

21. The appellants rely on Kundan Lal v. Shankar Lal 21 Ind. Cas. 13 : 35 A. 564 : 11 A.L.J. 910, Luximon Row Sadasew v. Mullar Row Bajee (1831) 2 Knap 60 : 5 W.R. P.C. 67 : 1 Nor L.C. 169 : 12 E.R. 401, Tottempudi Venkataratnam v. Tottempudi Seshamma 27 M. 228 and Amar Nath v. Firm of Hukam Chand-Nathu Mal 60 Ind. Cas. 371 : 2 L. 40 : 19 A.L.J. 249 : 40 M.L.J. 327 : 2 P.L.T. 208 : 33 C.L.J. 355 : 29 M.L.T. 258 : (1921) M. W. N. 175 : 25 C.W. N. 534 : 3 U.P.L.R. (P.C.) 12 : 23 Bom. L.R. 671 : 14 L.W. 435 : 42 P.W.R. 1921 (P. C), for the position that the mere fact that there is a family nucleus is sufficient to make out that all the acquisitions of a member belonging to the family are joint family property, and that the onus is heavily on any one who asserts that it is his self-acquisition to show that no part of the family nucleus went to help the member in the acquisition of such property. In the Lahore case the salary and acquisitions of a Civil Servant were considered joint family property as he was educated in England for several years at considerable expense to the family, and as the costly education he received enabled him to get into the Civil Service. Their Lordships of the Privy Council observe at page 49 Page of 2 L-Ed.

If he desired to give evidence to show that his specialised education in England was obtained by the presents of a friend, the charitable benefactions or the educational foundations of strangers or by his own self-taught efforts this should have been done by him at the trial.

22. In Kimdan Lal v. Shankar Lal 21 Ind. Cas. 13 : 35 A. 564 : 11 A.L.J. 910, it was held that property in the possession of a joint Hindu family should be presumed to be joint family property until the contrary is shown, even though it may have been acquired in the name of a particular member of the family. Richard, C.J., observes at page 568:

The normal and natural condition of the family being one of complete unity of interest, I cannot hold that any presumption arises from the mere fact that the property has been acquired in the name or names of one or more members of the joint family.

23. If this view be correct, the plaintiff ought to have proved that the property was acquired with the separate property of Mohan Lal or at least that after the acquisition he held it as separate property excluding the other members. The decision in Kumdan Lal v. Shankar Lal 21 Ind. Cas. 13 : 35 A. 564 : 11 A.L.J. 910, is no authority for saying that whenever property is acquired by a member of a joint Hindu family, it must necessarily, be presumed to be, joint. Where it is proved that there is no family nucleus which might in the ordinary course of things have helped him substantially in acquiring it, there is no warrant in any of these cases for the position that, where the family nucleus is so small that it

could not by any stretch of imagination have been the means of acquiring any portion of the property standing in the name of a. member such property should be held to be joint family property, In *Tottempudi Venkataratnam v. Tollepudi Seshamma* 27 M. 228, the facts were: one Subayya died in 1897 leaving two sons and four daughters and he bequeathed by his Will certain legacies. In the Will he stated that the properties were his self-acquisitions and that he had a right to dispose of them. A suit was brought for a declaration that the Will was invalid, as Subayya could not dispose of joint family property to the prejudice of his sons. The Subordinate Judge held that the property was joint family property and could not be disposed of by Will. On appeal the District Judge reversed the Subordinate Judge's decree on the ground that the property was self-acquisition of Subayya. The High Court reversed the decree of the District Judge and restored that of the Subordinate Judge. Sir Arnold White, C.J., and Moore, J., in the course of their judgment observed as follows:

Eliminating then the matters upon which the District Judge based his conclusion, what is left to rebut the presumption that the property was family property except the fact that from small beginnings the property became something considerable, worth about Rs. 20,000, This is not enough. As the Subordinate Judge points out, the growth of the property was the work of over half a century and was partly at least the product of the skill and labour of Subbayya's father; and; admittedly, there was a considerable nucleus of joint property to start with.

24. Here there is clear finding that Subbayya's father acquired considerable property and the family nucleus was large. That case can have no application to the facts of the present case where it is admitted that the family nucleus at the time of partition was worth only about Rs. 400 burdened with a debt of Rs. 500. Cases can be conceived where the family nucleus is mortgaged and the money raised on the security of it with which a trade is started and acquisitions made out of the savings of the trade profits; or where the family nucleus is given as security for an appointment, such as that of Dubash or cash keeper, and but for such security the member could not have secured the appointment, in such cases it may reasonably be held that the family property was the means or the foundation of the fortune that was acquired afterwards. Can it be said that Srinivasa Pillai, the 1st defendant, ever raised any money on the security of the family property? Is there any evidence that such property was offered as security for getting employment in Madras? In the partition-deed of 1000, Exhibit D(6), there is a recital that Srinivasa Pillai had gone to Madras for employment. It is in evidence that he was employed as clerk to a Dubash in 1886 and that he rose to the position of a Dubash in another firm in 1896 and continued to be so for 7 or 8 years. Srinivasa Pillai, who evidently was a man of business, was able to acquire in the course of 10 or 15 years property worth Rs. 30,000 to 40,000. When it is remembered that he borrowed large sums of money from the plaintiff ostensibly for the purpose of buying property, one cannot but come to the conclusion that the property standing in the name of the 1st defendant was his own self-acquisition and was not the outcome of any family nucleus. In one of his

letters Srinivasa Pillai tells the plaintiff that he was arranging for the purchase of a land and that he was going to get the document registered in Chidambaram. That evidently shows that he borrowed money for buying property. It is not an unusual thing for people who are in receipt of a good income to buy property in their own native village by borrowing money in the hope of discharging the debt from their earnings. There is no reason why the plaintiff's evidence as to what 1st defendant told him at the time when he borrowed money for buying properties in his village should not be accepted. I hold in the circumstances that it has been clearly proved that the properties are the self-acquisitions of the 1st defendant.

25. The next point urged by the appellant is that Exhibit E is a document which requires registration, and, therefore, no mortgage-decree could be given in plaintiff's favour. If Exhibit E is itself the only evidence of the transaction, or if by itself creates any rights, then, no doubt, the appellant's contention would be good. But we find here that the documents of title were deposited as security from the very beginning of the dealings between the plaintiff and the 1st defendant. The plaintiff maintains what is known as security register book. It appears that some documents were deposited with him so far back as 1897 and as properties were acquired very probably other documents were deposited and finally in 1913 accounts were settled and a list of the documents in deposit was prepared. I consider Exhibit E not as a mortgage transaction itself but as a list showing the items of properties mortgaged and the number of documents left with the plaintiff. The words in Exhibit E are important:

As you have paid me the sum of Rs. 13,900 on my simple promissory-note of the 4th instant I leave with you herewith the title-deeds and other documents of some of my self-acquired Immovable properties situated in the village of Uttama-solamangalam, Chidambaram Taluk, South Arcot District as per particulars below to be held by you in deposit as collateral security for the said loan until its repayment to you.

26. When there is clear evidence that documents were deposited from time to time and monies were advanced from time to time it cannot be said that the deposit of title-deeds was made by this document. This document gives particulars of the titledeeds left with the plaintiff. Though the present tense is used it cannot be said that the documents were left only after the date of this document or on the date of this document. The appellants rely upon *Chunilal Someswar Bhatt v. Vithaldas Karsandas* 68 Ind. Cas. 1005 : 24 Bom. L.R. 502. With great respect, it is very difficult to follow the reasoning of the learned Judges of the Bombay High Court. Section 17, Sub-section (2), Clause (v) of the Registration Act is quite clear.

Any document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of one hundred rupees and upwards to or in Immovable property, but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such

right, title or interest need not be registered.

27. In the face of that the learned Judges hold that though a document creates only a right to get another document, still it requires registration. The recent decision of the Privy Council in the Tinnevely case, Privy Council Appeal No. 113 of 1921 *Rajangam Ayyar v. Rajangam Ayyar* 69 Ind. Cas. 123 : 31 M.L.T. 136 : 4 U.P.L.R. (P.C.) 85 : 16 L.W. 615 : A.I.R. (1922) (P.C.) 266 is clearly against the decision in *Chunilal Somchshvar Bhatt v. Vithaldas Karsandas* 68 Ind. Cas. 1005 : 24 Bom. L.R. 502 . The deposit of title-deeds could be proved even though a letter accompanying it cannot be proved, unless it be that the letter itself is the only evidence of the transaction. This was held in *Muthiah Chetty v. Kothandaraswami Naidu* 35 Ind. Cas. 864 : 31 M.L.J. 347 : (1916) 2. M.W.N. 221 : 4 L.W. 472. Seshagiri Iyer, J. observes at page 31 M.L.J.-(Ed.):

There is clear authority which I am prepared to follow that if the letter made a bare reference to the factum of deposit and to the creation thereby of the equitable mortgage, the question of stamp or registration would arise.

28. I hold that Exhibit E does not require registration and that the mortgage by deposit of title-deeds is proved by the evidence of the plaintiff and the account books, which he has produced, which clearly show that the documents of title were given as security.

29. In the light of my finding on issue 6, viz., that the properties were the self-acquisitions of the 1st defendant, it is not necessary to consider the contentions urged by the appellants that the debt is not binding upon the other members of the family, defendants Nos. 2 to 6 and that there being no antecedent debts for which the father could alienate the family property, the mortgage itself being the only transaction, the alienation could not bind them. The question whether a mortgage in which there is a personal covenant to pay, can be considered to be antecedent debt is an interesting question and has not arisen for consideration by the Privy Council. In the three cases decided by the Privy Council, *Sahu Ram Chandra v. Bhup Singh* 39 Ind. Cas. 280 : 44 I.A. 126 : 21 C.W.N. 698 : 1 P.L.W. 557 : 15 A.L.J. 437 : 19 Bom. L.R. 498 : 26 C.L.J. 1 : 33 M.L.J. 14 : (1917) M.W.N. 439 : 22 M.T. 22 : 39 A. 437 : 6 L.W. 213 (P.C.) , *Chet Ram v. Rani Singh* 67 Ind. Cas. 569 : 49 I. A. 228 : 43 M.L.J. 98 : 3 P.L.T. 363 : 31 M.L.T. 50 : 16 L.W. 89 : (1922) M.W.N. 455 : 4 U.P. L.R. (P.C.) 64 : 44 A. 368 : 3 P.L.R. 1922 : 24 Bom. L.R. 123 : 27 C.W.N. 150 : AIR (1922) (P.C.) 47 , *Jogi Das v. Ganga Ram* 42 Ind. Cas. 791 : 21 C.W.N. 957 : (1917) M.W.N. 739, there was no personal remedy against the father outstanding. The mortgage properties alone were security for the debts. That a mortgage-debt without a personal liability of the father cannot sustain a subsequent alienation is quite clear from the three cases; but it is not quite clear whether a subsequent alienation in order to prevent the personal remedy in a mortgage-deed being enforced against a father would bind the sons and is a matter which requires consideration. In the case of a simple mortgage or even in the case of usufructuary mortgage where there is a personal covenant to pay, it is open to the mortgagee to give up his security and

ask for a. personal decree, and a personal decree could sustain a subsequent alienation by the father. Again, where there is a personal covenant and the mortgagee obtains a mortgage-decree and the mortgage property is not able to satisfy the decree amount, the father would be personally proceeded against, in which case also the unsatisfied portion of the mortgage-decree by the sale of the mortgaged property would sustain a subsequent alienation. Where the personal covenant to pay is outstanding in a mortgage document I cannot see why that covenant cannot sustain a subsequent alienation as an antecedent debt, even though no decree has been passed to enforce it. It is unnecessary to pursue this enquiry further, as any conclusion that, can be arrived at might be considered obiter in the light of the finding on Issue No. 6.

30. In the result the appeal is dismissed with costs of the plaintiff. Time for redemption extended to six months from this date. Interest at contract rate upto date of payment fixed, thereafter, at 6 per cent.