

(1943) 02 MAD CK 0016
In the Madras High Court

Damodarasami Naicken and Others

APPELLANT

Vs

Govindarajulu Naidu and Another

RESPONDENT

Date of Decision : 03-02-1943

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 89

Citation : AIR 1943 Mad 429 : (1943) ILR (Mad) 531 : (1943) 56 LW 194 : (1943) 1 MLJ 291

Hon'ble Judges : Alfred Henry Lionel Leach, C.J

Bench : Division Bench

Judgement

Alfred Henry Lionel Leach, C.J.—In the month of September, 1909, one Rangasami Naicken and his three sons, Govindasami,

Venkatasami and Narayanasami, who constituted an undivided family, mortgaged immovable properties belonging to the family to one

Lakshminarasimha Aiyar to secure the sum of Rs. 3,000. In 1912 the family separated and there was a partition of the family estate. The

mortgaged properties were divided into four shares and one share was allotted to each member. The deed of partition provided that the mortgage-

debt should be discharged by the sons in other words, each son was to be liable for one-third of the total debt. In 1913 Govindasami, the fourth

defendant in the suit, mortgaged his share of the family properties to Gurusami, the father of the defendants 1 to 3, to secure a ,loan of Rs. 2,500.

Govindasami failed to repay the loan and consequently Gurusami was compelled to institute a suit on his mortgage. He obtained a decree and in

execution proceedings in 1926 he bought Govindasami's interest in the hypotheca, which was, of course, subject to the prior mortgage in favour of

Lakshminarasimha Aiyar. Lakshminarasimha Aiyar died and in 1927 his legal

representatives sued to enforce the mortgage which had been created in his favour. They obtained a decree, which contained a direction that the properties purchased by Gurusami should not be brought to sale until the mortgaged properties in the hands of Venkatasami had been sold. Venkatasami had acquired the share of his brother Narayana-swami and therefore possessed two of the shares. The record does not disclose who held the father's share. In execution proceedings instituted in 1928 Lakshminarasimha Aiyar's legal representatives sold the properties in the hands of Venkatasami, but Venkatasami paid into Court sufficient to obtain an order setting aside the sale under the provisions of Order 21, Rule 89, Civil Procedure Code, and consequently it was set aside.

2. The plaintiffs in the present suit are the legal representatives of Venkatasami who is also now dead. They sued to recover from Gurusami and his sons one-third of the amount which Venkatasami had been compelled to pay to obtain the order setting aside the sale and relied on the provisions of Section 82 of the Transfer of Property Act. The Subordinate Judge of Coimbatore, who tried the suit, upheld the plaintiff's claim and on appeal his decision was concurred in by the District Judge. The basis of the decision was that Gurusami was bound by the agreement embodied in the deed of partition that the sons should discharge the mortgage in equal proportions. The defendants contend that they cannot be compelled to contribute more than a quarter of the sum as the words "in the absence of a contract to the contrary" in the first paragraph of Section 82 have reference only to a contract which governs both the mortgagee and the mortgagor. There is a conflict of authority of this Court on this question and in the circumstances the learned Judges before whom this appeal came for hearing have referred the following questions to a Full Bench for decision;

1. Whether a contract to the contrary between the co-mortgagors alone can exclude the operation of Section 82 of the Transfer of Property Act?
2. If the answer to question No. 1 is in the affirmative, whether such a contract binds a subsequent assignee of the property of a co-mortgagor with notice of the contract?
3. The first paragraph of Section 82 was amended by the Transfer of Property (Amendment) Act, 1929. Before the amendment this paragraph

read 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 incumbrance to which it is subject at the date of the mortgage.

This paragraph now reads as follows:

Where property subject to a mortgage belongs to two or more persons having distinct and separate rights of ownership therein, the different shares

in or parts of such property owned by such persons are, in the absence of a contract to the contrary, liable to contribute rateably to the debt

secured by the mortgage, and, for the purpose of determining the rate at which each such share or part shall contribute, the value thereof shall be

deemed to be its value at the date of the mortgage after deduction of the amount of any other mortgage or charge to which it may have been

subject on that date.

4. As pointed out in Mulla's "Transfer of Property Act" , (second edition, page 486) the amendment makes two improvements. In the first place

the section is made to apply not only where several properties are mortgaged, but where the mortgaged property is subsequently divided into

shares held in severalty, and in the second place it fixes the date of the mortgage as the date at which the valuation for the purpose of contribution

should be made. The amendment admittedly goes no further.

5. The words "whether of one or several owners" which appeared in the section before its amendment are of importance when considering the

answers to be given to the questions under reference. In a case where several properties were mortgaged and all belonged to the same person

there could only be a "contract to the contrary" between the mortgagee and the mortgagor. It takes two persons to make a contract and the words

in the absence of a contract to the contrary" cannot be divorced from the words which precede them. It is also to be observed that the section

imposes the liability to contribute on the land and not on the individual.

6. Until the decision in 1935 of Thoppai M. Muthiah Bhagavathar and Others Vs. T.V. Venkatarama Ayyar and Others, , the opinion of this Court

was that the words "in the absence of a contract to the contrary" meant in the absence of a contract to the contrary between the mortgagee and the mortgagor. The question was first debated in *Ramabhadrachar v. Srinivasa Aiyangar* ILR (1900) . Mad. 85 where the facts were analogous to the facts in the present case. After the creation of a mortgage of joint family properties the father and his three sons, who constituted the family, separated. Each took a fourth share in the family properties and agreed amongst themselves that each should be liable for a fourth of the mortgage debt. Subsequently one of the sons sold the greater portion of his share to the plaintiff in the suit to whom he gave a security "bond for a sum of money and a mortgage over other property to indemnify him from loss which might arise if the mortgagee of the family properties brought them to sale. The mortgagee of the family properties sued on his mortgage and in execution sold part of the hypotheca, thereby realising sufficient to satisfy the decree. The part sold included the property which the plaintiff had bought from the son. Thereupon the plaintiff sued on his security bond and the land mortgaged to him was sold. The plaintiff then brought a suit u/s 82 of the Transfer of Property Act and claimed rateable contribution from the other portions of the > hypotheca which had not been sold to satisfy the mortgagee's decree. It was held that he was entitled to rateable contribution. The defence was that the plaintiff was only entitled to contributions in respect of monies paid by him in excess of one quarter of the mortgage debt. In rejecting this contention the Court (White, C. J. and Benson J.) observed:

This question depends upon the construction of the words "in the absence of a contract to the contrary" in Section 82 of the Transfer of Property Act. Having regard to the principle upon which the equitable doctrine of contribution is based, as illustrated in the English authorities to which our attention has been called, it seems clear that an agreement binding only as between the mortgagors is not a "contract to the contrary" within the meaning of the section, and that these words were intended to apply to contracts between mortgagor and mortgagee--contracts, for example, under which some of the mortgaged properties were to be liable in the first instance and others were only to be liable in the event of the security of the properties liable in the first instance being insufficient.

In the present case the contract which, it is contended, is a "contract to the contrary" which prevents the application of the doctrine of rateable distribution, was nothing more than a partition amongst the coparceners of an undivided Hindu family. The proportionate liability of the members of the family inter se for the amount of the mortgage debt existed apart from any express contract which they may have chosen to make. The contract as between the parties, the owners of the equity of redemption, is of course binding, but it is not a contract which binds their assigns. Assuming that the plaintiff took with notice of this contract, inasmuch as such a contract does not run with the land at law, he is not bound by it in equity by reason of the fact that he took with notice. (See *Austerbery v. Corporation of Oldham* (1885) L.R. 29 Ch. D. 750. In our opinion there was no contract to the contrary within the meaning of Section 82, and the plaintiff is entitled to rateable contribution.

7. In *Kunchithapatham Pillai v. Palamalai Pillai* (1916) 32 M.L.J. 347 Seshagiri Aiyar and Napier, JJ., said with reference to the second paragraph

of Section 82 that a contract to the contrary can only be between the parties who are liable to contribute, but their ultimate decision did not run

counter to *Ramabhadrachar v. Srinivasa Aiyangar* I.L.R.(1900) Mad. 85 and they referred to it with apparent approval. In *Kunchithapatham Pillai*

v. Palamalai Pillai (1916) 32 M.L.J. 347 a mortgagor sold a portion of the mortgaged property to A and directed him to pay a part of the

mortgage-debt. He sold another portion to B with a direction that he should also pay a part of the debt. Later, he sold the rest of the property to C

with a similar direction. The amount to be paid by C was much larger. The purchasers did not pay what they had agreed with the mortgagor to pay

to the mortgagee. Consequently the mortgagee brought a suit on his mortgage and obtained a decree. A and B paid such portions of the debt as

would, but for their undertakings, have been proportionately chargeable on the properties purchased by them, but less than what they had

undertaken to pay. In order to avoid a sale C had to pay to the mortgagee considerably more than what he had agreed with the mortgagor to pay

and he sued the other two persons for contribution. It was held that the claim was not sustainable u/s 82 of the Transfer of Property Act. The

correctness of the decision is not open to doubt from any point of view. The defendants had already paid what they were liable to pay u/s 82 and

there was no contract between the respective purchasers making them liable to pay more.

8. Jackson, J., followed *Ramabhadrachar v. Srinivasa Aiyangar* I.L.R.(1900) Mad. 85 in *Muthukumaraswami Mudaliar v. Govinda Padayachi*

(1931) 35 L.W. 145 and in doing so observed that "'a contract to the contrary'" within the meaning of Section 82 of the Transfer of Property Act

was not a subsequent contract between the mortgagors, and if the mortgagors were pleased to distribute their liabilities amongst themselves, that

was their personal contract, which did not run with the land.

9. The next decision of this Court is that in *Thoppai M. Muthiah Bhagavathar and Others Vs. T.V. Venkatarama Ayyar and Others*, , which was

decided by Ramesam and Venkatasubba Rao, JJ., and it is this case which has given rise to the conflict with *Ramabhadrachar v. Srinivasa*

Aiyangar I.L.R.(1900) Mad. 85 Ramesam, J., having said that Section 82 has solely to do with the distribution of the burden on the properties in a

case, where no other question as to who had the benefit of the money or similar complication arises, proceeded to give indication of the opinion

that "'a contract to the contrary'" within the meaning of the section is a contract between the mortgagors. Venkatasubba Rao, J., was, however,

more explicit. He expressly dissented from the opinion held by the learned Judges who had decided *Ramabhadrachar v. Srinivasa Aiyangar* I.L.R.

(1900) Mad. 85. The reason for his dissent is indicated in this passage in his judgment:

The section deals with the rights of the owners inter se and it would be proper and natural to infer that the contract referred to is a contract

between them, that is, those liable to contribute.

10. In the opinion of Venkatasubba Rao, J., the judgment of the Privy Council in (1930) L.R. 57 I.A. 189 (Privy Council) established this. We

shall refer presently to that case but in passing we may say that we do not share his opinion with regard to the effect of the decision.

11. Madhavan Nair, J., followed *Ramabhadrachar v. Srinivasa Aiyangar* I.L.R. (1900) Mad. 85 in *S.A. Subramania Ayyar and Others Vs. M.*

Natesa Sastrigal and Others, and in *Arunachalam Padayachi v. Ramanatha Chettiar* (1936)M.W.N. 859 . On the other hand, Venkataramana

Rao, J., followed *Thoppai M. Muthiah Bhagavathar and Others Vs. T.V.*

Venkatarama Ayyar and Others, in *Bava Sahib v. Krishna Boyan* (1936)

M.W.N. 859 and in *Muthusami Pillai Vs. Arasayee Ammal and Another*, , as did King, J., in *Induru Pattabirami Reddi Vs. Kakarala*

Venkatappayya and Others, .

12. We will now turn to the decision of the Judicial Committee in (1930) L.R. 57 I.A. 189 (Privy Council) where the facts were these. In 1906 the

original owner of two properties referred to as K and M respectively mortgaged them to one Mangal to secure the sum of Rs. 8,000. On the 19th

May, 1914, the original owner purported to sell property K to one Sher Singh, the ancestor of the respondents, for Rs. 33,000. Out of the

purchase price, Rs. 32,000 was left with Sher Singh to enable him to discharge the mortgage of 1906 and other debts of the vendor. In July, 1914,

property M was sold to the first appellant on behalf of himself and the second appellant in execution of a decree obtained by a creditor of the

mortgagor before the 19th May, 1914, The sale was, of course, subject to the mortgage to Mangal. On the 21st May, 1914, property K was sold

under a decree obtained by another creditor of the mortgagor before the 19th May, 1914. This sale was also subject to Mangal's mortgage. The

purchaser later on conveyed , this property to Sher Singh. Sher Singh failed to pay off Mangal's mortgage and the other debts of the mortgagor

out of the money left with him for the purpose, and Mangal's mortgage continued against both the properties. In 1918 Mangal sued on his

mortgage and he obtained a decree for sale. In 1921 the properties were sold, but before the sale was confirmed Sher Singh deposited the amount

required to satisfy the mortgagee's claim and thus obtained an order setting aside the sale. Sher Singh having died, the respondents in the appeal,

his representatives, launched the suit to compel the appellants as owners of property M to contribute towards the amount which Sher Singh had

applied in paying off the debt under Mangal's mortgage. The defendants' answer was that there was no right of contribution because Sher Singh

had a contract with the mortgagor to apply the Rs. 32,000 which he had received in 1914 when he bought property K in payment of the amount

due to the mortgagee. The Subordinate Judge on the strength of the decision in *Mohamed Abbas v. Mohamed Hamid* (1912) 9 A.L.J. 499 held

that there was an equitable principle which precluded the respondents from

insisting on the right of contribution. The High Court, on the other hand, took a different view, and held that the appellants were not parties to the contract between Sher Singh and the mortgagor for the application of the money, that the benefit of the contract had not in any way passed to them, that in these circumstances the provisions of Section 82 applied and that the appellants were bound to make contribution. The Privy Council agreed with this decision. In delivering the judgment of the Board Lord Tomlin said:

It seems to their Lordships that Section 82 is the section that governs the case and that as the Act prescribes the conditions in which contribution is payable it is not proper to introduce into the matter any extrinsic principle to modify the statutory provisions. The decision in the case to which the Subordinate Judge referred may be justified on the footing that in that case there passed to the party from whom contribution was sought the benefit of the contract by which the money was to be applied, so that he could say, "I have a contract which frees me from the liability to contribution which the section would otherwise impose on me." No such plea is available to the appellants in this case. They were not parties to the contract of the 9th May, 1914, nor has the benefit of that contract passed to them in law or in equity.

13. We fail to see anything in this judgment which casts doubt on the decision of this Court in *Ramabhadrachar v. Srinivasa Aiyangar* I.L.R.(1900)

Mad. 85 which we regard as good law As we have already indicated the first paragraph of Section 82 of the Transfer of Property Act before the

amendment of the section could only be read as contemplating "a contract to the contrary" to which the mortgagee was a party, and the

amendment was not intended to alter this position. Moreover this section is based on the English law which is conveniently stated in Fisher on

Mortgages (7th edition, page 567) in these words:

The doctrine of contribution rests upon the principle that a fund, which is equally liable with another to pay the debt, shall not escape because the creditor has been paid out of that other fund alone.

If several estates, whether of one or of several owners are mortgaged for, or subject equally (and not one as surety or collateral security for the other) to one debt ...the several estates will contribute rateably to the debt.

14. Sir V. Bhashyam Aiyangar in his argument in *Ramabhadrachar v. Srinivasa Aiyangar* I.L.R.(1900) Mad. 85 pointed this out. Obviously, there

can be no objection to mortgagors agreeing what their rights and liabilities with regard to the contribution inter se shall be, but as such a contract

will not run with the land it cannot affect a third party, unless he agrees to be bound by it. Where the contract is between a mortgagee and his

mortgagors the position is different because such a contract will run with the land.

15. For the reasons given we hold that the words "'in the absence of a contract to the contrary'" in Section 82 of the Transfer of Property Act relate

to a contract to which the mortgagee is a party and such a contract will run with the land. There is nothing to preclude mortgagors agreeing what

their liabilities with regard to contribution shall be inter se. Where a mortgage embraces several properties owned by different mortgagors a person

who acquires the interest of one or more of the mortgagors will not be bound by an agreement between the mortgagors inter se unless he agrees to

be bound by it. We answer the questions referred in this sense.

16. The costs of the reference will be made costs in the appeal.