
(1921) 03 MAD CK 0014
In the Madras High Court

Elumalai Chetty and Jagannadha Chetty	APPELLANT
Vs	
P. Balakrishna Mudaliar	RESPONDENT

Date of Decision : 31-03-1921

Acts Referred:

Transfer of Property Act, 1882 — Section 54

Citation : AIR 1922 Mad 344 : (1921) ILR (Mad) 965 : 66 Ind. Cas. 168 :
(1921) 14 LW 379 : (1921) 41 MLJ 297

Hon'ble Judges : Napier, J; Krishnan, J

Bench : Full Bench

Judgement

Krishnan, J.—The first question that arises for our decision in this Second Appeal is whether an indorsee for value of a negotiable instrument

the amount of which had been secured by a mortgage by deposit of title-deeds can claim to enforce the mortgage in the absence of a registered

instrument conveying the mortgage rights to him.

2. A somewhat similar question arose before the Learned Chief Justice and my learned brother with reference to an indorsee for collection in

Cunnaiya v. Gopala Chettiar (1920) 40 M. L J 25 and was answered in the indorsee's favour. That decision however, is not conclusive in this

case as here we have an indorsee for value and the judgment of my learned brother in that case was based" entirely on the fact that the

indorsement was for collection ; and though the Learned Chief Justice makes no such distinction, my learned brother did not apparently agree with

his Lordship's views. Sitting with Hughes, J., the learned Chief Justice has again stated his view in Perumal Ammal v. Perumal Naicker (1920) 40

M. L J 25 that though the rule is now that a mortgage right or debt cannot be transferred without a registered instrument u/s 54 of the Transfer of

Property Act it is subject to the exception that ""where the law still admits of the separate transfer of the mortgage-debt as by (he indorsement of a promissory-note secured by a deposit of title-deeds or by the attachment and sale in execution of a mortgage debt Section 8 of the Transfer of Property Act still operates to carry the security with it."" We are, of course, not concerned with court sales of mortgage debts or their effect in this case; that will be governed by the special provisions of the Code of Civil Procedure. The observation regarding promissory notes is clearly an obiter dictum if I may say so with respect ; and though the opinion of the Learned Chief Justice is entitled to great weight, there is no decision binding on us and we must, therefore, consider the question raised before us on its merits.

3. It seems to me quite clear that a mortgage of Immovable property is itself Immovable property under the Transfer of Property Act whatever the form of "the mortgage may be; and the transfer of ownership of such a right falls u/s 54 and will require a registered instrument for the purpose:

Vide Sakhiuddin Saha v. Sonaulah Sarkar (1918) 22 C.W.N. 641 and 40 M.L.J. 25. It is true that the Chief Justice sitting on the Original Side as

Wallis, J. (as he then was) held, relying on Section 8 of the Act, that the transfer of a mortgage was the transfer of the debt with its attendant

securities and that registration was, therefore, unnecessary for the transfer of a mortgage. Vide Dwaraka Doss Govardhana Doss v. Dhanakoti

Animal (1913) 15 M.L.T. 198. There was some conflict of opinion on the point. See Subramanyam v. Perumal Reddi ILR (1895) Mad. 454 on

one side and the opinion of Bashyam Ayyangar, J., in Ramasami Pattar v. Chinnan Asari ILR (1901) Mad. 449 and the decision of Chamier, J.,

(as he then was) in Mutsaddi Lal v. Muhammad Hanif (1912) 10 A.L.J. 167 following it, on the other side. In this conflict of views the Legislature

amended the Act in 1900 and excluded mortgage debts from the category of actionable claims. The object was plainly to remove mortgage debts

from the scope of Section 8 which speaks of ""debt or other actionable claim"", and to make it necessary to have a registered instrument for its

transfer. It was on the application of Section 8 that it was held that the transfer of a mortgage did not require registration and with the non-

applicability of the section resulting from the amendment one would have thought that all doubts regarding the necessity of having a registered

instrument for the transfer of a mortgage right in all cases would have been removed. But the learned Chief Justice thinks as stated above, that

though the rule is now clear with reference to mortgage debts in general there is still an exception in favour of mortgages by deposit of title-deeds

where promissory notes have also been taken for the mortgage amounts. With every respect for his Lordship's opinion I find it difficult to follow it.

It is clear from his judgment in the case that he would have held that a registered instrument would be necessary" to convey the mortgage rights

even in a case of a mortgage by deposit of title deeds if no negotiable instrument had been taken for the mortgage amount. Does the taking of the

negotiable instrument make any difference on the point? I think not, as the mortgage debt is none-the-less a mortgage debt because it happens to

be also a promissory note debt. If it is a mortgage debt, Section 8 cannot apply to it and the whole argument based on the section fails.

4. The fact that the promissory note can be transferred by endorsement, it seems to me does not make any real difference on the question before

us. When the note amount is so transferred it seems to me, it is not transferred as a secured debt at all. " The Negotiable Instruments Act makes

no provision with reference to securities. In my view it is only if a mortgage debt is transferred as a secured debt that it will carry the securities with

it on the principle embodied in Section 8 ; and not otherwise. Even in the case of a mortgage where there is no promissory note it cannot, I think,

be said that the law does not allow the mortgagee to transfer the debt as an unsecured or simple debt without a registered instrument if he thinks fit

to do so. The security is for his benefit and he can give it up if he likes ; and the transferee will then get the right to the debt but not to the security.

Thus, as regards transferability in law as an unsecured debt, a mortgage debt for which a negotiable instrument has been taken does not seem to

me to differ fundamentally from one where none such has been taken. In my view, in either case if the debt is transferred by endorsement or

otherwise without the transferor taking care to transfer the mortgage right by a registered instrument, the debt and the security will get disassociated

and the security may possibly cease.

5. If we are to hold that the security passes by the indorsement of the promissory notes in cases of mortgages by deposit of title-deeds where

notes have been taken for the mortgage amounts we must hold the same view with reference to any kind of mortgage where the mortgagee

happens to have taken a promissory note for the mortgage amount; for the argument will be just the same. We will also have to hold that not only

the first indorsee but every subsequent indorsee including even blank indorsees will obtain the mortgage rights by indorsement unless, of course, a

different intention is manifest. This view, I think, will introduce a grave uncertainty into the registration of mortgages and render the records of the

Registration office unreliable in ascertaining in whom the mortgage right subsists, for the time being. Such a view, therefore, does not commend

itself to me. If I am right in thinking that Section 8 does not apply to mortgage debts, there is no scope for the application of the maxim generalia

specialibus non derogant. But if it did apply, I am inclined to think it would make Section 54 of the Act override Section 8 rather than the other

way ; for Section 8 refers to all kinds of securities whereas Section 54 so far as is relevant, refers only to a limited class of securities-the mortgage

securities. See Mutsaddi Lal v. Muhammad Hanif (1912) 10 A.L.J. 167 .

6. No valid argument can be based on the alleged anomaly of holding that the transfer of a mortgage by deposit of title deeds requires registration

when the creation of it does not ; for that seems clearly to be the law at any rate where there is no promissory note involved.

7. After careful consideration I have come to the conclusion, though not without hesitation on account of the opinion of the learned Chief Justice to

the contrary, that the indorsee of a negotiable instrument does not get any right to the mortgage by deposit of title deeds in his indorser's favour by

the mere indorsement of the note without a registered transfer of the mortgage rights.

8. On this view it is argued that the District Munsif had no jurisdiction to try the suit as his jurisdiction was based solely on the fact that some of the

lands mortgaged were within his jurisdiction. It is contended that on the finding that the mortgage rights did not pass to the plaintiff the Court lost

jurisdiction. That is not so ; jurisdiction has to be judged on the averments in the plaint, unless indeed an averment has been fraudulently made for

the express purpose of giving jurisdiction. There is no such allegation here. Jurisdiction does not depend upon the relief the Court finds itself able to

give after trial. The jurisdiction of the Court in this case is, therefore, not affected by the view I am taking ; but the decree so far as it gives relief

against the property mortgaged must be set aside.

9. There will be a personal decree only against defendants 1 and 2 for the amount found due and interest at 6 per cent, from date of suit to date of

payment. The rest of the suit is dismissed. The order as to costs in the first Court will stand but the parties will bear costs in this and the Lower

Appellate Court.

Napier, J.

10. I agree, I had already prior to the hearing of the case before the Learned Chief Justice expressed my opinion in an unreported case. I saw no

reason to alter it during the argument in that case nor do I now.