

(1939) 11 MAD CK 0028
In the Madras High Court

Eswara Krishna Aiyar and Another

APPELLANT

Vs

Mariya Susai Reddiar and Others

RESPONDENT

Date of Decision : 09-11-1939

Acts Referred:

Citation : AIR 1940 Mad 498 : (1940) 51 LW 239 : (1940) 2 MLJ 1003

Hon'ble Judges : Venkataramana Rao, J

Bench : Division Bench

Judgement

Venkataramana Rao, J.—This is an appeal from the judgment of the learned District Judge of South Arcot in a suit to enforce a mortgage dated 29th November, 1919, executed by defendants 1 to 3 in favour of the fifth defendant. This deed of mortgage Ex. A was assigned by a deed of assignment Ex. C dated 9th January, 1932, in favour of the third plaintiff who was a benamidar for plaintiffs 1 and 2. The fourth, defendant is the son of the first defendant the sixth defendant is the fifth defendant's wife; the seventh defendant is the undivided son of the fifth defendant; and the eighth defendant is a purchaser in Court auction of the suit properties in execution of a money decree against defendants 1 and 2 subsequent to the date of the mortgage. The ninth defendant, is the Official Receiver who was added as a party since the date of the suit as the representative of the first defendant who was adjudged an insolvent. The sum sought to be recovered in the suit was Rs. 20,000 which is the amount secured under the said mortgage. The main defence of the eighth defendant who became the purchaser of the right, title and interest of the first defendant in the suit properties in execution of a money decree was that the plaintiffs were not entitled to recover a sum of Rs. 20,000 but, only Rs. 11,111-1-9. The defence of defendants 5 to 7 was that they were not liable for the suit claim. To understand the plea of the eighth defendant a few facts are necessary. The mortgage Ex. A comprises two sets of properties: (1) the properties situate in the village of Orathur which belonged to defendants 1 and 2, and (2) the, properties in Perumbakkam village which belonged to the third defendant. The mortgage is usufructuary and provided that the mortgagee should enjoy the properties in lieu

of interest and there is a clause which provides for redemption to this effect:

We shall pay the said sum in any month of Chitrai when you may choose to ask for the amount, or when we desire to pay the amount and redeem the properties. In default, we agree that the amount may be received by process of Court.

2. On the 25th November, 1922, by a registered lease the said properties were leased to the mortgagors for a period of five years stipulating an annual rent of Rs. 2,109. In default of payment or rent it was provided in the deed that the lessor was entitled to recover the balance of the amount due and payable with interest at one per cent, per mensem from the lessees personally and also from and out of the properties leased, but by a later clause the personal liability of the second defendant and the fourth defendant was excluded and it was stipulated that only the properties would be liable. There can be no doubt that this document creates a charge over the properties leased, that is the properties mortgaged under Ex. A, for the rent that may be due and payable thereunder. It is also stated that an intermediate charge was created over the property in favour of the fifth defendant's son-in-law benami for the fifth defendant but it does not appear from the record what the nature of that charge was and when it was redeemed, and for the purpose of this appeal we have to proceed upon the footing that on the same properties there was a mortgage and a subsequent charge created by the mortgagors in favour of the same plaintiff under the said lease. Any decision that we give here will be without prejudice to the rights and obligations that may be enforceable under any such intermediate charge if any subsisting. It appears that although the property was leased to all the mortgagors only the third defendant enjoyed the income from the mortgaged property. But he failed to pay the rent and on the 27th September, 1929, there was a sum of Rs. 19,700 due and payable, For a sum of Rs. 15,000, part of the said sum of Rs. 19,700, the third defendant sold all the lands in Perumbakkam village, by a sale deed Ex. I dated 27th September, 1929, mortgaged under Ex. A to the fifth defendant absolutely. The operative portion of the said deed runs thus:

Deducting the balance due to you is Rs. 19,700. Out of this amount you have agreed to give credit to a portion, namely, Rs. 15,000. As I have received the said sum in that manner I have in lieu thereof hereby sold to you absolutely the undermentioned properties belonging to me and in my possession and have delivered possession. You shall hold and enjoy the undermentioned properties from this day forwards with rights of alienation such as gift and sale. To this effect have I executed this deed of absolute sale with consent.

3. On a perusal of the deed there can be no doubt that the third defendant conveyed the said property to the fifth defendant free from encumbrances to be enjoyed by the fifth defendant with full powers of alienation. What the effect of this conveyance on the rights of the parties is we shall consider later. On the 9th January, 1932, the sixth defendant, the wife of the fifth defendant purchased

from Maria Susai Reddiar and his son, the first and second plaintiffs herein, certain properties for a sum of Rs. 35,000. Part of the consideration, namely, a sum of Rs. 15,000 was paid by way of execution of a promissory note by the fifth defendant in favour of the vendors. In regard to the balance of Rs. 20,000 the consideration was said to have been paid thus:

I have also received Rs. 20,000 in respect of the assignment of the usufructuary mortgage debt bond for Rs. 20,000 executed this day by your husband Eswara Krishna Aiyar in favour of my wife Rose Mary Ammal at my instance - the said usufructuary mortgage debt bond having been executed on 29th November, 1919, by Orathur Duraiswami Reddi and others in the name of your husband for Rs. 20,000.

4. It is conceded that the sixth defendant was only a benamidar for the fifth defendant. The usufructuary mortgage in favour of the fifth defendant was assigned in favour of the wife of Susai Reddi as part of the consideration Rs. 20,000. This was effected by a deed of assignment Ex. C bearing the same date. In the deed of assignment it is clearly stated that the properties in Perumbakkam were excluded and the operative portion of the assignment deed ran thus:

I have assigned to you the undermentioned usufructuary mortgage bond and have given to you my rights under the said usufructuary bond as per its terms excepting the properties in Perumbakkam village You shall yourself enjoy the undermentioned properties from this day forward.

5. It is on the strength of Ex. C that the present suit was filed. The contention of the eighth defendant that he is not liable to pay the sum of Rs. 20,000 is thus stated by him in paras. 5 and 6 of his written statement:

5. Since the fifth defendant under whom the present plaintiffs claim a right to the suit mortgage has purchased a portion of the mortgaged property as stated in para. 4 above even before the date of the alleged assignment, the suit mortgage as well as the mortgage referred to in para. 3 have become split up and portions of the mortgage debts (in proportion to the value of the properties purchased by the fifth defendant) have become extinguished.

6. On the date of the suit mortgage, and on the date of the mortgage referred to in para. 3 above, items 1 to 89 were worth Rs. 20,000; 4/9th of the suit debt became therefore extinguished and so only 5/9th of the amount, namely, Rs. 11,111-1-9 only can be recovered out of items 1 to 89 in Schedule II-A. In any event irrespective of the question as to whether any portion of the debt became extinguished since the mortgage has split up for the reasons stated in para. 5 above, the plaintiffs will not be entitled to recover the whole amount from items 1 to 88 only. The plaintiffs can recover from these items only the proportionate amount of the debt, namely, 5/9th which amounts to Rs. 11,111-1-9.

6. In effect the substance of the contention is that by the fifth defendant purchasing the Perumbakkam properties the integrity of the mortgage was

broken up and there was a pro tanto extinction of the debt and the mortgagors, defendants 1 and 2, were entitled to redeem the suit property only on payment of a proportionate amount, namely, Rs. 11,111-1-9. The learned District Judge has given effect to this contention and given a mortgage decree against the suit properties only for a sum of Rs. 11,000 and odd and in respect of the balance he gave a decree against the fifth defendant on the ground that there was a covenant for title under Ex. C in and by which he covenanted that Rs. 20,000 was recoverable from the suit properties and as there was a breach of that covenant the plaintiffs were entitled to get the balance from the fifth defendant. This appeal is preferred by defendants 5 and 7.

7. Two contentions have been advanced by Mr. T.M. Krishnaswami Aiyar their learned Counsel: (1) the purchase by the fifth defendant under Ex. I of the Perumbakkam properties from the third defendant was a purchase for full value of the entirety of the property free of the mortgage under Ex. A and not merely of the equity of redemption and therefore the last clause of Section 60 of the Transfer of Property Act would not apply so as to entitle defendants 1 and 2 to claim redemption of their property on payment of only a proportionate part of the debt and the plaintiffs would therefore be entitled to recover the entire amount of the mortgage from the suit properties; and (2) the decree against the fifth defendant is wrong because there was no covenant for title given by him under the assignment Ex. C. In regard to the first contention Mr. Krishnaswami Aiyar put his case thus: where the mortgagee does not acquire merely the equity of redemption but acquires the full ownership in a part of the security, whether its full value or part thereof is or is not utilised for the reduction of the mortgage debt, the part security having fetched its full value from the mortgagee-purchaser the remedies of the mortgagee as such regarding the balance due are not affected at all either as regards the mortgage amount that may remain payable or the entirety of the remainder of the properties left as security, against which he may proceed; Section 60 has no application to such cases. He also urged that it is open to the mortgagee to release his mortgage right over any portion of the security and the substance of the transaction evidenced by Ex. I must amount to a release of the mortgage right under Ex. A and purchase of the property free of that mortgage right in full satisfaction of a debt which is common to both the mortgagors and whatever rights of contribution defendants 1 and 2 may have in, respect of Perumbakkam properties the rights of the mortgagee and therefore of his assignee to proceed against the properties of defendants 1 and 2 cannot be affected by the fifth defendant's purchase. The contention of Mr. V.V. Srinivasa Aiyangar on behalf of the eighth defendant is that a right of partial redemption conferred under the last, clause of Section 60 of the Transfer, of Property Act is separate altogether from any question about the amount on the payment of which alone such partial redemption could be obtained and the moment in any manner or by any means a share in the equity of redemption becomes vested by acquisition in the mortgagee, the mortgagor or any one of the mortgagors gets the right of asking for and obtaining partial

redemption.

8. Before dealing with the soundness of these contentions it will be necessary to examine the scope of the last clause of Section 60 of the Transfer of Property Act which runs thus:

Nothing in this shall entitle a person interested in a share only of the mortgaged property to redeem his own share only on payment of a proportionate part of the amount remaining due on the mortgage, except only where a mortgagee, or if there are more mortgagees than one, all such mortgagees, has or have acquired in whole or in part the share of a mortgagor.

9. This clause is based on the principle that a mortgage is indivisible and it has to be redeemed entirely or not at all. Where there is a mortgage for an entire sum and properties belonging to one or several owners are secured thereunder, it is not open to a mortgagor or one of several mortgagors to redeem an item or his share only on payment of a proportionate part of the debt because there is only "one mortgage, one, debt and one entire right against all," whether against persons or properties. The only exception provided by the clause is where a mortgagee acquires the share of the mortgagor. Two conditions are necessary for the exception to operate, namely:

(1) the acquisition must be as a mortgagee, that is, as holder of the mortgage, and

(2), what is acquired should be the share of the mortgagor.

10. The question is what is meant by the words "share of the mortgagor". In the context it can only mean the interest of the mortgagor outstanding after the creation of the mortgage, that is, the ownership of the property minus the interest vested in the mortgagee and according to legal phraseology it would be the equity of redemption, that is, a right to redeem a particular mortgage. The equity of redemption is a relative term and will vary according as there are one or more mortgages of the same property. This according to the plain meaning of the language of the clause there must be an acquisition of the equity of redemption in the mortgaged property or part thereof by a mortgagee qua mortgagee. In the case of such acquisition the clause provides that a person interested in a share of the mortgaged property can redeem his share on payment of a proportionate part of the debt. Here the question arises who is meant by a person interested in a share of the mortgaged property? Again, the plain meaning of the clause suggests that it is only applicable to cases where the mortgaged property is owned or becomes absolutely owned by several co-sharers or owned in distinct and separate ownerships by more than one mortgagor. In the case of a single mortgagor where rights of third parties do not intervene whether it is a single individual or a group of individuals constituting an entity the application of the clause presents no difficulty. It is only in the former class of cases questions really do arise in regard to the rights in the mortgaged property becoming vested in more than one person. It may be necessary in this

connection to examine the reason why an exception is made to the general rule that the redemption must be of an entirety of the property in cases where the mortgagee acquires a share of the mortgagor. When the mortgagee acquires the equity of redemption he steps into the shoes of the mortgagor in respect of the property purchased subject to the mortgage in his favour. There is thus, a fusion of interests of both the mortgagor and the mortgagee and the mortgage becomes extinguished. The result of the extinguishment is that the mortgage debt over that property is wiped out, though every parcel of the mortgaged property so far as the mortgagee is concerned is liable for the entire mortgage debt but as between the mortgaged properties they are liable to contribute rateably to the debt (Section 82 of the Transfer of Property Act). This principle would apply as between the mortgagors inter se. As the mortgagee by purchase of the equity of redemption becomes a mortgagor in respect of the property purchased, the principle would apply also against him by virtue of his taking the character of a mortgagor in respect of a portion of the property. The extent of the debt that is wiped out will be proportionate to the relative value of the property purchased. In the case of a single mortgagor or where there is more than one mortgagor, with their consent, when the mortgagee purchases the equity of redemption in an item or a part of the property, no question of partial or piecemeal redemption would arise because the rest of the property would still be owned by the mortgagor or mortgagors and it would be liable for the remainder of the mortgage debt. It may be said that the rest of the property is "the share of the mortgagor" within the meaning of the section. It does not matter, whether the equity of redemption is purchased in execution of a decree against a mortgagor or by private treaty. The principle applicable would be the same in both cases. Vide *Bisheshur Dial v. Ram Sarup* I.L.R.(1900) 22 All. 284 (execution sale), *A.A.R. Ponnambala Pillai and Others Vs. Annamalai Chettiar (dead) and Others*, (execution sale) and *Mutty Lal Pal v. Nandu Lal Neogi* 12 C.W.N. 745 (private treaty). Where a person interested in the mortgaged property is not the mortgagor alone and before the purchase of equity of redemption portions of the mortgaged property become vested in third parties or where the mortgagee purchases from a co-sharer his share or an item of property from an owner who held it in distinct ownership, not only is the debt pro tanto extinguished but the owners of different items will be entitled to redeem the properties on payment of the proportionate part of the debt. There is no doubt about the applicability of this rule. The same principle would apply in whatsoever manner the equity of redemption is acquired by the mortgagee, that is, by inheritance - *Hamida Bibi v. Ahmad Hussain* I.L.R.(1909) 31 All. 335, - or by devise.

11. The next question arises in the case of a mortgagee purchasing the entire interest in the mortgaged property free of the mortgage. *Mookerjee, J., in Mir Eusuff Ali Haji v. Panchanan Chatterjee* 15 C.W.N. 800, expressed the opinion that if the sale was of the property, free of the mortgage and the intention of the parties was that the mortgagee should hold the portion transferred to him free from the mortgage debt and the purchase money should be applied in

redemption of his dues, it would obviously be erroneous to maintain that the mortgagee was still bound to apportion the debt. There he was dealing with a case where the purchase was by the mortgagee from the mortgagor when the rights of no third parties intervened. Applying the principle which he enunciated He remarked thus:

In the case before us it is clear from the conveyance executed by the mortgagors in favour of the mortgagee that the price paid by the latter was intended to represent the value of the entire interest and not merely of the equity of redemption. It was further intended that this purchase money should be applied in reduction of the debt and that the mortgagee should hold the property purchased free from the, mortgage lien. It is not open to the mortgagors therefore to claim credit for a larger amount than what was fixed as the purchase money and as between the mortgagors and the mortgagee, the latter is entitled to hold the property exempt from the mortgage lien. The appellants who are purchasers of the interest of the mortgagors in the other properties stand in no higher position; they have consequently no legitimate ground for complaining that the mortgagee seeks to throw the burden of the remainder of the mortgage debt upon the properties in their hands.

12. No doubt in that case the agreement between the mortgagor and the mortgagee was that the purchase money should go in the reduction of the mortgage debt. It was open to the mortgagor and the mortgagee to come to any agreement in regard to the satisfaction of the debt. Therefore where the transaction is solely between the mortgagor and the mortgagee it may be there is no scope for the apportionment of the debt as the matter rests on contract between the parties. But the question is, can, the principle enunciated by Mookerjee, J., be extended even to a case where the matter does not rest between the mortgagor and the mortgagee and third parties such as co-mortgagors or purchasers, of the equity of redemption of a portion of the mortgaged property are interested in the mortgaged property? When a mortgagee purchases the property free of his mortgage and pays the full value of the property, the substance of the transaction is that the mortgagee gives up his mortgage right and purchases the property as if it were an unencumbered property paying the full value therefor. The acquisition by the mortgagee in such a case would be not as a mortgagee. If the acquisition is viewed as an acquisition by the mortgagee in the character of a mortgagee it would mean that the mortgagee was also purchasing his own interest. Therefore the transaction can only be viewed as a release of his mortgage right and then a purchase by him. Mookerjee, J., in *Mir Eusuff Ali Haji v. Panchanan Chatterjee* 15 C.W.N. 800, was inclined to the view that when the rights of third parties intervene, it is not open to a mortgagee to give up his mortgage right over any portion of the mortgaged property. But our High Court has taken a different view. In the Full Bench decision in *V. Perumal Pillai Vs. R.M.M.R.M. Raman Chettiar*, , it was definitely ruled that it is open to a mortgagee to release his right over any portion of the mortgaged property and, proceed against the rest of the

Mortgaged property for the entirety of the debt though the effect of such a release would not affect the right of contribution which the owners of several portions of the mortgaged properties will, have under the law, and the fact that third parties are interested in the property would not affect the right of the mortgagee to do so. It was conceded at the Bar that it is open to a mortgagee to release his right in respect of an item or part of the property and some time later become a purchaser of that item or part in which case no question of pro tanto extinguishment of the debt would arise at all. The principle is that once the right of the mortgagee is released, the property ceases to be the subject of the mortgage and the acquisition by the mortgagee would therefore be just like an acquisition by any other stranger acquiring the property. In *Sesha Aiyar and Another Vs. Krishniengar and Others*, , there was a purchase by a second mortgagee of a portion-of the mortgaged property held in distinct ownership by more than one mortgagor in execution of a decree on a prior mortgage over the said property. It was held that by such acquisition the integrity of his mortgage was not broken. In the course of the judgment it was observed thus:

It being granted that the plaintiffs (second mortgagee) with regard to their purchase at the sale of Rangayya Goundan's decree (first mortgage) must be treated as strangers and that the whole property free from encumbrance and free from plaintiffs' right of redemption was put up for sale and bought, we can see no ground for holding that their claim under their mortgage is in any way impaired.

13. The learned Judges explain the principle thus:

The cases in which the property has been sold and bought subject to the mortgage which it is sought to enforce are clearly distinguishable from the present case in which the purchasers, though they happened to be mortgagees must be taken to have paid the full value of the unencumbered property.

14. No doubt it may be contended that when a purchase is made in execution of a first mortgage and when all the persons interested in the mortgaged property are parties to it, the sale will be of the entire interest in the property, namely, not only the first mortgagee's interest in the property but also the interest of the mortgagor which was outstanding on that mortgage which would include also the rights of the second mortgagee who must be taken to stand in the shoes of the mortgagor so far as the first mortgage is concerned. The purchase may in effect be said to be in derogation of the second mortgagee's right and not as second mortgagee. But if the section were to be interpreted literally as contended for by Mr. V.V. Srinivasa Aiyangar, the second mortgagee must be deemed to have acquired the share of the mortgagor within the meaning of the section. Therefore the principle underlying the decision shows that it is not in every case a purchaser acquiring the mortgaged property or a portion thereof must be deemed to be acquiring the share of the mortgagor within the meaning of Section 60 but it is only in cases where the mortgagee in the character of a mortgagee acquires the equity of redemption outstanding in the mortgagor.

Therefore if before or at the time of acquisition the mortgagee renounces his character of mortgagee and purchases the property, the last clause of Section 60 would have no application. The principle enunciated by Mookerjee, J., need not be confined only to cases where the agreement between the mortgagor and the mortgagee is that the amount paid should go in satisfaction of the mortgage debt. It would be open to the mortgagor to agree that the amount paid for the purchase might go in reduction of any debt due to the mortgagee unconnected with the mortgage. The Kustea Loan Office, Ltd. v. Annada Charan Chackrabarty 27 C.W.N. 763 is a case in point. In that case a certain property was acquired by Government under the Land Acquisition Act and the compensation money was deposited into Court. With the consent of the mortgagors the amount was allowed to be appropriated in respect of their unsecured debts and Ghose, J., in the course of the judgment explained the substance of the transaction thus:

Before any third person had acquired any interest in any portion of the mortgaged property the mortgagees were entitled, if they so desired, to pay the whole amount of, the compensation money to the mortgagors. They would thereby have reduced their own security and the interest of no other person would have been affected in any way. What happened in this case practically amounts to this that the mortgagees made over a part of the compensation money to the mortgagors and the mortgagors paid it back to the mortgagees in satisfaction of their unsecured debts.

15. In effect what the learned Judge says is that the mortgagees must be deemed to have released their rights over the mortgaged property and received the compensation money from the mortgagors. No doubt Ghose, J., says that this could not be done where third parties are interested because the view of the Calcutta High Court as already stated is that it is not open to the mortgagee to release a portion of the mortgaged property when the rights of third parties intervene. But as that is not, the law so far as this Presidency is concerned the principle of the decision would apply without any qualification suggested by Ghose, J. No doubt the mortgagee in possession of the property as owner thereof would not be in a position to resist a suit for contribution at the instance of a co-mortgagor or a person owning other portions of the mortgaged property. But that would not affect the right of the mortgagee to recover the entirety of the debt from the rest of the mortgaged property and if he can do so there is nothing to prevent him assigning that right and the assignee by virtue of the assignment recovering the entirety of the debt from the rest of the mortgaged property. If the mortgagee sues, a claim for contribution by way of set off may be open against him.

16. Having regard to these principles the question in this case will have to be dealt with. Under Ex. I there can be no doubt that the fifth defendant purchased the property free from encumbrances from the third defendant. The purchase was in effect free not only of the mortgage under Ex. A but also free of the charge under the lease. Fifth defendant must therefore be deemed to have

released his right under Ex. A over the said property. No doubt his liability for contribution as owner of the Perumbakkam property to defendants 1 and 2 as owners of Orathur property will remain unaffected. But the fifth defendant's right as mortgagee to release the entirety of the debt from the Orathur property cannot be questioned and whatever rights he had under Ex. A he assigned them under Ex. C. In our opinion therefore the assignee the third plaintiff would be entitled to recover and realise the entire amount of Rs. 20,000 from the Orathur property. We are also of the opinion that if the mortgaged property be found insufficient, the third plaintiff would be entitled to realise the balance personally from defendants 1 to 3. Though the fifth defendant has given up his right over the Perumbakkam village, still the right of the third defendant to personally pay the mortgage money under Ex. A has not been released and he will be bound to pay the balance. In this view it is unnecessary now to consider the extent of the obligations of the fifth defendant under Ex. C. Our decision in this case would leave unaffected the right of defendants 1, 2 and 8 to claim contribution from the fifth defendant by reason of his being the owner of the Perumbakkam properties. All these matters will have to be adjudged in a separate suit. We are of the opinion that it is not open to defendants 1 and 2 to claim redemption by paying only a proportionate part of the debt nor for the eighth defendant who has purchased their right and interest to resist the plaintiffs' claim for the recovery of the entire sum from the properties in his possession.

17. We accordingly allow the appeal, set aside the decree against defendants 5 and 7 and modify the decree of the learned District Judge against defendants 1 to 3 and 8 by granting a mortgage decree against them for the amount claimed in the plaint, but in the circumstances of this case we are not inclined to allow any costs to the appellants.