(1923) 04 MAD CK 0042

In the Madras High Court

Garudappa Peria Thiruvadi Ayyangar and Another — APPELLANT

Vs

Pokutti Janaki and Others — RESPONDENT

Date of Decision : 19-04-1923

Acts Referred:
Transfer of Property Act, 1882 — Section 101

Citation : (1923) 18 LW 530 : (1923) 45 MLJ 693

Hon'ble Judges : Venkatasubba Rao, J;Krishnan, J

Bench : Full Bench

Judgement

Krishnan, J.—My learned brother has set out the facts of the case in his judgment which he is about to deliver and they need not therefore

be repeated. I agree with him that the Second Appeal fails but for reasons somewhat different from his.

2. It seems to me clear that if a person buys property over which he has a mortgage himself and the mortgage in consequence becomes discharged

by merger or by the terms of the sale deed he can nevertheless use that mortgage as a shield against any puisne incumbrancer who attempts to

enforce his claim against the property, unless his intention to extinguish the mortgage is clear otherwise. That is the principle of Section 101 of the

Transfer of Property Act. The buyer cannot be credited with the intention of altogether extinguishing his mortgage for all purposes when it is found

to be to his benefit to keep it alive, merely because in the deed of purchase a part of the purchase money is treated as going in discharge, of his

mortgage. Whether the purchase is statedly of the whole property for a price made up of the price of the equity of redemption and of the mortgage

amount or whether it is, statedly, of the equity of redemption, only the transaction is substantially the same; and as it is for his benefit to keep the

1st mortgage alive we cannot necessarily assume the existence of an intention on his part to extinguish it even in the former case. See the decision in

Chidambara Nadan late a Minor but now declared a Major and Another Vs. Musuvati Muni Nagendrayyan and Others, . The pusinee mortgagee

loses nothing by the 1st mortgage being used as a shield as he bargained only for a right subject to the 1st mortgage and there is no reason why his

right should be enlarged because the prior mortgagee purchases the property. In the present case therefore I should have been prepared to hold

that defendants 2 and 3 had not lost their right to plead their 1st mortgage under Ex. I as against the plaintiff but for the covenant in their deed of

purchase Ex. III whereby they expressly undertook to pay off the whole of the plaintiff''s mortgage amount. That I think makes the difference in this

case.

3. Having covenanted to pay the plaintiff''s mortgage amount themselves it is not open to them to deny their liability. It is contended that plaintiff

cannot take advantage of the covenant in Ex. III as she was not party to it and reference was made to Jamna Das v. Ram Aular Pande (21 M.L.J.

1158 a decision of the Privy Council. This might be so; but the 1st defendant with whom the covenant was made and who is entitled to enforce it,

is a party to this suit and has asked the Court to enforce it by making defendants 2 and 3 pay the plaintiff''s mortgage amount themselves by sale of

item I free of encumbrances. I do not see why that claim should not be enforced in this suit. Defendants 2 and 3 have no answer to that claim. It

was argued that 1st defendant should be left to sue for damages for breach of covenant if he suffers any injury by reason of defendants 2 und 3 not

paying off the plaintiff''s mortgage. He will no doubt have a right to sue for damages but that is not a reason why in this suit itself when the parties

are all before us their tights should not be adjusted. There is no necessity to drive the 1st defendant to a separate suit for damages. I would

therefore in enforcement of the covenant between 1st defendant and defendants 2 and 3 direct that item I be sold free of any claims by the latter

under their mortgage; and for that reason I would support the decree of the lower appellate Court.

4. A somewhat similar case arose in Govindasami Tevan v. Doraisami Pillai I.L.R. (1910) M 119: . where a person purchased property subject to

2 mortgages and covenanted with the vendor that he would pay off both mortgages. He paid off the 1st mortgage but not the 2nd. In a suit by the

2nd mortgagee he pleaded the 1st mortgage he had paid off as a shield against the plaintiff but his plea was disallowed. The learned Judges have

based their judgment on the view that as the 1st mortgage had been paid off in pursuance of a covenant to discharge it, it could not be treated as

alive for any purpose, or used as a shield. Whether this is the right view to take or not, I am inclined to think that the decision is clearly right though

1 should be inclined to put it on the ground above stated that the covenant by the vendee with the mortgagor-vendor to pay off the 2nd mortgage

could be enforced in the 2nd mortgagee''s suit where all the parties arc-be fore the Court; and consequently the 1st mortgagee cannot be allowed

to plead his mortgage as a shield.

5. For the above reasons I agree that the Second Appeal should be dismissed with costs of the plaintiff.

Venkatasubba Rao, J.

6. I shall state very briefly the facts material for the decision of the question involved in this second appeal. The plaintiff was originally the owner of

the suit item with which we are concerned. She executed a mortgage in favour of defendants 2 and 3, and it is evidenced by Ex. I dated 10-7-

1904. The plaintiff then sold the property to the first defendant by Ex. II dated 8.8.1906 subject to the mortgage in favour of defendants 2 and 3.

The effect of these two transactions may be shortly stated to be that the second and third defendants acquired a mortgage right in respect of a

property of which the owner was the first defendant, and for the purpose of deciding the question at issue we must have regard to this result, and a

separate consideration of each of these two transactions as distinct from and unconnected with the other is net called for. Then we come to the

third transaction, namely, the creation of a mortgage in favour of the plaintiff by the first defendant, Ex. C, dated 16-8-1906. The suit out of which

this second Appeal has arisen was based upon this mortgage. Fourthly the first defendant sold the property, to the second defendant for the benefit

of defendants 2 and 3 subject to the mortgage in favour of the plaintiff. This sale is evidenced by Ex. III dated 23-2-1914.

7. What is the net result of these transactions? We may start with the first

defendant as the owner of the property. ''I here is a first mortgage in favour of defendants 2 and 3. The first defendant then executed a second mortgage in favour of the plaintiff. Finally the first defendant sold the property to defendants 2 and 3 (I already stated that the sale was in favour of the second defendant for the benefit of defendants 2 and 3) subject to the mortgage in the plaintiff''s favour.

8. The plaintiff instituted this suit on her mortgage. The second and third defendants pleaded in respect of their own mortgage priority over the mortgage of the plaintiff. The question to be decided is, have they such priority?

9. Section 101 of the Transfer of Property Act runs as follows: ""Where the owner of a charge or other encumbrance on Immovable property is or becomes absolutely entitled to that property, the charge or encumbrance shall be extinguished, unless lie declares, by express words or necessary implication, that it shall continue to subsist, or such continuance would be for his benefit.

10. According to this section as the continuance of the encumbrance would be for the benefit of defendants 2 and 3, the mortgage in their favour would continue to subsist unless there is evidence of an intention to extinguish such mortgage. We must turn to Ex. III, the deed of sale dated 23-2-1914, to find out what the intention of the parties was. It recites that the consideration for the sale is Rs. 3,400 and that it is made up in the following manner: (1) Rs. 1,500 retained with the purchaser (the second defendant or practically defendants 2 and 3) being the amount due to the plaintiff under the hypothecation bond dated 16th August 1906 (Ex. C.) (2) Rs. 800, the amount received in cash by the first defendant the seller.

(3) Rs. 1,100, the amount agreed by this deed to be the equivalent of the mortgage dated 10-7-1904 (Ex. I.) in favour of defendants 2 and 3.

11. In the first place it is to be observed that defendants 2 and 3 have undertaken by this document to pay the plaintiff Rs. 1,500 due in respect of her mortgage. Is this undertaking consistent with an intention to keep alive their own mortgage in the sense that it is to prevail over the mortgage of the plaintiff? I have no doubt that they are not entitled to enforce the mortgage in their favour as against the plaintiff. Let me take a very simple example. A property is mortgaged in favour of A to secure a sum of Rs. 100. B takes a second mortgage over the same property for the sum of

Rs. 200. A finally purchases the property subject to the two mortgages for Rs. 50. If B sues for the recovery of Rs. 200 and the property is found

worth Rs. 300 or more, no question of priority arises, as the value of the property is sufficient to discharge both the mortgages. But, if the property

realises less than Rs. 300, the question becomes material, is the mortgage in favour of A subsisting or is it extinguished? Ordinarily he will be

entitled to say that the mortgage in his favour is subsisting. (Section 101 of the Transfer of Property Act). If the property, for instance, realises only

Rs. 100, A will be entitled to claim that sum in discharge of his own prior encumbrance. ''But, supposing that the sale deed in favour of A contains

a covenant by A to pay B the full amount of Rs. 200, how can then A say that he is still entitled to priority? It is that very right to priority that is

destroyed by the covenant. It has been suggested that all that A undertakes is, that he renders himself liable to pay B Rs. 200 in the event of the

security being found sufficient to pay both the mortgages. To me this argument seems absolutely untenable. As I already observed, if the security

realise a sum sufficient to pay both the mortgages, B will be paid his Rs. 200 as a matter of course. Then, where is the need for a special covenant?

The covenant becomes relevent only when the security is found insufficient.

12. The second and third defendants have undertaken to pay the plaintiff Rs. 1,500. The undertaking is absolute. They have not said that they will

be liable to pay Rs. 1,500 only in the event of the security being found sufficient to pay off both the mortgages. The competition is only as between

the plaintiff on the one hand and the second and third defendants on the other. The second and third defendants entered into the covenant that,

notwithstanding that the law favours them in this competition, they will allow the plaintiff to take precedence of them. There is no third party

involved. The contest is merely between the plaintiff on the one hand and the defendants 2 and 3 on the other. If the plaintiff is to have her entire

Rs. 1,500, no question of priority can possibly arise. Defendants 2 and 3 having agreed to pay her that sum, they must be deemed to have clearly

intended that the mortgage in their favour should be extinguished. Of the cases cited, the only case that has a bearing upon this question is

Govindasami Thevan v. Doraisami Pillai I.L.R.(1910) M. 119 : 20 M.L.J. 380, and the view that I have taken is consistent with the principle underlying this decision.

13. Apart from this, I am prepared to hold on a construction of Ex. III that the prior mortgage in favour of defendants 2 and 3, Ex. I, was agreed

to be treated as discharged. If the prior mortgage is discharged by payment in full no further question can arise. What difference does it make that

the creditor has waived a portion of the amount due to him and has agreed to treat the mortgage in his favour as completely discharged? I am

prepared to go even further. Suppose the purchaser, the prior mortgagee, agree with the seller, the mortgagor, to forego the entire amount and

treat the mortgage as discharged, what difference does it make? Whether the mortgage is discharged by payment in full or by an agreement

between the parties, the result is the same, and the mortgage becomes extinguished. When the mortgage is discharged or is extinguished, no further

question of subrogation can arise. In the course of the argument it was suggested by Mr. Seshagiri Sastri, the learned Vakil for defendants 2 and 3,

that the agreement to discharge may be effective as between the mortgagor and the mortgagee, but it can have no force as against the pusine

encumbrancer. I fail to see how a mortgage deed in fact can be used as a shield against the subsequent encumbrancer. All that Section 101 enacts

is that a mortgage which in fact exists must not in law be deemed to be extinguished by reason of the merger in the same - individual of the two

interests, the interest of the mortgagee and the interest of the owner of the equity of redemption. To say that a mortgage which has become

extinguished springs into existence to be enforced against the puisne encumbrancer is opposed to principle and there is nothing in the section which

lends support to such a view.

14. I find in the terms of the deed, Ex. III, sufficient indication of a discharge of the prior mortgage in favour of defendants 2 and 3. The Rs. 1,100,

the third item of the consideration, is described in the deed to be ""the equivalent of"" the mortgage dated 10-7-1904. If this rendering is correct

there is a complete discharge. But, a rival translation was suggested, namely, that the tamil words only mean ""on account of"" and not ""as an

equivalent of."" Even if this meaning be adopted, I am still of the opinion that the mortgage was treated as completely discharged. It is extremely

improbable that, if the purchaser intended that his prior encumbrance should be kept alive to any extent, he would pay to the seller in cash Rs. 800.

Any balance payable to the seller would have been set off against the amount due on the footing of the mortgage. As a matter of fact, there is no

dispute that to the extent of Rs. 1,100, at any rate, there was no actual payment but there was merely an adjustment. Then again, it must be

remembered that the sum of Rs. 1,100 represents the principal and interest upon it at 27 1/2 per cent. The rate of interest provided for in Ex. I is

75 per cent. There is nothing unlikely in the second and third defendants-having agreed to forego a portion of this exhorbitant interest. The amount

actually received by them includes interest calculated; as pointed out, at 27 1/2 per cent, a rate quite high. In the circumstances, I also hold on a

construction of Ex. Ill that the second and third defendants agreed to treat the mortgage, Ex. I, in their favour as completely discharged.

15. The result is that the second appeal fails, and is dismissed with costs.

