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**(1923) 04 MAD CK 0012**  
**In the Madras High Court**

Garudappa Peria Thiruvadi Ayyangar and Another APPELLANT  
Vs  
Pookutti Janaki and Others RESPONDENT

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**Date of Decision :** 19-04-1923

**Acts Referred:**

Transfer of Property Act, 1882 — Section 101

**Citation :** AIR 1924 Mad 103 : 75 Ind. Cas. 1016

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

**Bench :** Division Bench

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**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 never the less, 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 lor 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

first 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 puisne

mortgagee loses nothing by the first mortgage being used as a shield as he bargained only for a right subject to the first 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 Nos. 2 and 3 had not lost their right to plead their first mortgage under Exhibit I as against the plaintiff but for the

covenant in their deed of purchase, Exhibit 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 was contended that plaintiff

cannot take advantage of the covenant in Exhibit III as she was no party to it and reference was made to Jamna Das v. Ram Autar Pande 13 Ind.

Cas. 304 : 34 A. 63 : 16 C.W.N. 97 : 11 M.L.T. 6 : 9 A.L.J. 37 : (1912) M.W.N. 32 : 15 C.R.L.J. 68 : 14 Bom. L.R. : 21 M.W.J. 1158 : 39

I.A. 7 (P.C.), a decision of the Privy Council. This might be so; but the first 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 Nos.2 and 3 pay the plaintiff's mortgage amount

themselves by sale of Item No. 1 free of incumbrances. I do not see why that claim should not be enforced in this suit. Defendants Nos. 2 and 3

have no answer to that claim, It was argued that first defendant should be left to sue for damages for breach of covenant if he suffers any injury by

reason of defendants Nos. 2 and 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 rights should not be adjusted. There is no necessity to drive the first defendant to

a separate suit for damages. I would, therefore, in enforcement of the covenant between the first defendant and defendants Nos. 2 and 3, direct

that Item No. 1 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 *Govindasawmi Thevan Vs. T.M. Doraisawmi Pillai and Others*, where a person purchased property subject

to two mortgages and. covenanted with the vendor that he would pay off both mortgages. He paid off the first mortgage but not the second. In a

suit by the second mortgagee he pleaded the first 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 first 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 I 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 second mortgage could be enforced in the second mortgagee's suit, where all the parties are before the Court; and consequently the first

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 Nos. 2 and 3, and it is evidenced by Exhibit I dated

10th July 1904. The plaintiff then sold the property to the first defendant by Exhibit II dated 8th August 1906 subject to the mortgage in favour of

defendants Nos. 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 the 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 not

called for. Then we come to the third transaction, namely, the creation of a mortgage in favour of the plaintiff by the first defendant, Exhibit C dated

16th August 1906. The suit out of which the 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 Nos. 2 and 3 subject to the mortgage in favour of the plaintiff. This sale is evidenced

by Exhibit III dated 23rd February 1914.

7. What is the net result of these transactions? We may start with the first defendant as the owner of the property. There is a first mortgage in

favour of defendants Nos. 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 Nos. 2 and 3 (I already stated that the sale in favour of the second defendant was for the benefit of defendants Nos. 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 he 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 Nos. 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 Exhibit III, the deed of sale

dated 23rd February 1911, 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 Nos. 2 and 3) being

the amount due to the plaintiff under the hypothecation bond dated 16th August 1906 (Exhibit C); (2) Rs. 800 the amount received in cash by the

first defendant the seller; and (3) Rs. 1,100 the amount a Teed by this deed to be the equivalent of the mortgage dated 10th July 1904 (Exhibit 1)

in favour of defendants Nos. 2 and 3.

11. In the first place, it is to be observed that defendants Nos. 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. 300. 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 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 realises 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 relevant only when the security is found insufficient.

12. The second and third defendants have undertaken; to pay the plaintiff Rs. 1,500. The undertaken 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 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 Nos. 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 Nos. 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 Govindasawmi Thevan Vs. T.M. Doraisawmi Pillai and Others, , 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 Exhibit III, that the prior mortgage in favour of defendants Nos. 2 and 3, Exhibit 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, agrees 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 Nos. 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 puisne encumbrancer. I fail to see how a mortgage dead 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, Exhibit III, sufficient indication of a discharge of the prior mortgage in favour of defendants Nos. 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 10th July 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 the interest upon it at 27 1/2 per cent. The rate of interest provided for in Exhibit 1 is 75 percent. There is nothing unlikely in the second and third defendants having agreed to forego a portion of this exorbitant interest. The amount actually received by them included interest calculated, as pointed out, at 27 1/2 percent, a rate quite high. In the circumstances, I also hold on a construction of Exhibit III that the second and third defendants agreed to treat the mortgage, Exhibit I, in their favour as completely discharged.

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