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**(1920) 11 MAD CK 0003**  
**In the Madras High Court**

Govinda Padayachi and Others

APPELLANT

Vs

Lokanatha Aiyar and Others

RESPONDENT

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**Date of Decision :** 11-11-1920

**Acts Referred:**

Transfer of Property Act, 1882 — Section 60, 91

**Citation :** AIR 1921 Mad 51 : (1921) 40 MLJ 114

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**Judgement**

1. The items of property in dispute in this appeal, Nos. 5 to 7 were hypothecated by their owners, 1st and 2nd defendants, in 1897 by Exhibit II

and mortgaged with possession in 1901 by Exhibit III. In 1902 one Krishna obtained a money decree against 1st and 2nd defendants and in 1906

brought to sale and himself purchased these items, but has not succeeded in obtaining possession. In 1913 however Exhibits V and VI purporting to

be sale deeds of the property, were executed by 1st and 2nd defendants to one Siraimittan and 11th defendant, now represented by 8th, 13th and

14th defendants, the present appellants, with recitals showing that the two documents were really interdependent, the consideration consisting in

the discharge of Exhibits II and III and the payment of Rs. 200 to 1st and 2nd defendants for payment to Krishnier "" in discharge of the amount of

his auction sale certificate "" that is, as appellants say, as consideration for the repurchase from him of the property. In fact only Exhibits II and 111

were discharged, appellants obtaining possession from the mortgagee under the latter. But, 1st defendant alleges owing to nth defendant's default,

although there is no finding on this point, the Rs. 200 were not paid to Krishnier and appellants therefore have never completed their title as owners

of the property. Their defence also included objections to the validity of Krishnier's purchase in execution. But they are not relied on here. The

question argued is whether appellants are entitled to retain possession against plaintiff, successor in interest of Krishnier, or whether he can eject

them only either on payment to them of what they spent on the discharge of Exhibits II and III or, if they cannot have credit for discharge of those

documents, after completing his rights immediate possession against the mortgagee under the latter by himself discharging it.

2. In supporting the first of these alternative contentions, appellants admit that they cannot rely on any ordinary right of subrogation, since they

cannot and do not contend that Exhibits V and VI conferred on them any immediate interest in the property, which their payments were intended

to protect. Cases, such as, *Syamalarayudu v. Subbarayudu* (1897) 7. L.R. 21 Mad 143 . *Palamalai Mudaliar v. The South Indian Export Co.*

*I.L.R.(1909) Mad. 334* and *Karuppan Ambalagaran v. Mohammad Sakuth Levvai* *ILR (1918) M.L.J. 74* are accordingly irrelevant, because in

them payments by a person claiming at their date a direct and completed interest in the property protected were in question, in the two first the

payment being made consistently with ownership under a transfer, valid, unless and until in the one case a prior transferee and in the other the

transferor's creditors attacked it, whilst in the third the payment was regarded as officious, because the transfer, on which the right to make it was

based, was regarded as nominal and conferring no rights. These cases deserve mention only, because they involve what *Gurdeo Singh v.*

*Chandrikah Singh and Ghandrikan Singh v. Rashbehari Singh I.L.R.(1907) Cal. 193* and *Narayana Kutti Goundan v. Pechiammal ILR (1911)*

*Mad. 426* enunciate directly that ""the doctrine of subrogation is not applied for the mere stranger or volunteer, who has paid the debt of another,

without any assignment or agreement for subrogation, without any obligation to make the payment and not being compelled to do so for the

preservation of any right of his own "". Appellants' claim is first that they paid as assignees under Exhibits V and VI of the right of 1st and 2nd

defendants, the mortgagors, to redeem and that such payment entitles them to possession in place of the usufructuary mortgagee.

3. The right of the mortgagor thus relied on is that recognised in Sections 60 and 91 of the Transfer of Property Act; and there is no doubt that it is

recognized there as exercisable by the mortgagor and enforceable by him by suit without restriction. It is however argued that this right was not

assigned to appellants by Exhibits V and VI and in any case could not have been exercised by the 1st and 2nd defendants, or by appellants, when

the letters payments were made, because the former had lost all interest in the mortgaged property at that time and had also ceased to be

personally liable.

4. These points, like others arising in the appeal, have been argued very closely. On the first there is certainly no more reason in consequence of

the direction in Exhibits V and VI to pay the mortgagee money why the mortgagor's right to redeem should be regarded as having passed by those

documents than by the court sale to plaintiff, since on each occasion the transfer purported equally to be of 1st and 2nd defendants' whole interest;

and it is therefore necessary to hold either that the right of 1st and 2nd defendants had been transferred by the court sale and could not have

passed by Exhibits V and VI or that 1st and 2nd defendants could confer their right to redeem as mortgagors on an unlimited number of persons,

whether or no they transferred any right in the mortgaged property with it. The latter alternative corresponds with nothing in authority and would

enable a mortgagor to add indefinitely to the list of persons entitled to redeem u/s 91. It cannot be accepted.

5. The suggestion that Section 60 empowers the mortgagor to redeem. If he has parted with the mortgage property and is exempt from personal

liability, is also unacceptable. It is true that the definition of the mortgagor in Section 58 and subsequent references to him in the Act include

nothing, which entails that his rights are determined in the first or in both of the contingencies mentioned; and that Section 60 and Order 34, Rule 7,

CPC confer on him remedies in respect of possession without explicit mention of the right to it of his transferees. But those provisions merely deal

with procedure and describe the remedy in general terms with reference to the normal case of the mortgagor, who is prima-facie and in the

simplest form of the relation between the parties, seeking redemption. It is not necessary for the present purpose to decide whether a suit is

sustainable by a mortgagor, against whom only the personal remedy is available and who desires to have the amount of his liability ascertained in

order to discharge it and whether such a suit should result in a decree in his favour for possession of the property subject to his duty to surrender it

to his transferee on the latter reimbursing him what he has paid. But at least in cases, such as that before us, when the mortgagor has no debt to pay and no right in property to preserve, he would, if he offered to repay the mortgage money, be as much a volunteer as any stranger; and there is every reason against allowing him to intrude between the mortgagee and those actually interested in the property. It is as much for the benefit of the latter as of the former that the right to redeem should not be unduly extended, since it must carry with it the right to sue for redemption; and those directly interested might suffer substantial injury, if, as would be the case, their own right to sue for redemption were determined by the fact that a person not really concerned had already been allowed to obtain a decree, which (possibly in collusion with the mortgagee) he did not execute.

*Vedapurathu v. Vallabha Valla Raja* I.L.R.(1902) Mad 300 . The extent of the mortgagor's rights in such a case as the present has not, so far as

we have been shown, been considered in India; and reference may be confined to certain English authorities, since the contrast between English

and Indian practice and the reasons for the difference between them are significant. In *Kinnawad v. Trollore* (1888) 39 Ch. D 636 a decision cited

by appellants, but which really assists respondents, Stirling, J. said "" if the mortgagee sues the mortgagor on his covenant, the case of *Palmer v.*

*Hendrie* 27 Beav. 349, and 28 Beav. 341 shows that the mortgagor having paid what is due on the mortgage is in some way or other entitled to

require the mortgagee to perform the duty of reconveying the mortgaged property;" and later ""the mortgagor would be entitled to a reconveyance

in the form indicated in *Pearce v. Morns* L.R. 5 Ch. 227 namely subject to such equity of redemption as may be vested in any person other than

himself."" But it is to be observed first that this right of the mortgagor is recognized, only when he has been sued on his covenant, and therefore

would not be available to the present 1st and 2nd defendants or appellants; and next that the principle of *Kinnawad v. Trollore* (1888) 39 Ch. D

636 has not, so far as has been shown, been applied in this country and, the point favourable to respondents, it was justified in England on grounds

inapplicable here. For it was explained in *Palmer v. Hendrie*, 27 Beav. 349 and 28 Beav. 341 as based on the facts that a mortgagee could pursue

all his remedies, action on the covenant ejectment and foreclosure, at once, but that, as soon as the mortgaged money had been paid, he was

bound to deliver over the mortgaged estate to the mortgagor. This differs from the Indian procedure in the essential respect that the mortgagee is bound under the latter to exhaust his remedy against the estate before making the application for a personal decree, which corresponds with the English action on the covenant; and there can in India be no question of his obligation to return the estate, which will have been sold, to the mortgagor on proceeding against him. In these circumstances, the reference to English practice rather supports the conclusion already suggested, that a mortgagor's right to redeem and to sue for redemption is determined, when he ceases to be liable for any debt and to be interested in the security. In accordance with the foregoing the decision must be that appellants' claim to reimbursement cannot be justified by reference to any assignment of 1st and 2nd defendants rights.

6. This failing, appellants' claim has next to be considered, as based on what they alleged to be the equitable principle, that, as they made their payments in good faith on the understanding that they were to obtain an interest in the property, which would have justified them, they are to be regarded as having been entitled to make them and to be subrogated accordingly. Before however any attempt is made to decide whether this statement of the principle is correct, it is necessary to refer to the facts, to which it is to be applied. In their written statements appellants mentioned the mortgages, Exhibits I and II and their possession based on their payments under the sale-deeds, Exhibits V and VI; and in connection with the payment of Rs. 200 to be made to Krishnier under the last mentioned they alleged that the matter had been settled, although they set out various objections to his purchase at court auction. In Exhibits V and VI the Rs. 200 is referred to as received by 1st and 2nd defendants on their undertaking that they would "discharge the amount in respect of the auction sale certificate granted to Krishnier." In his written statement 1st defendant referred to the Rs. 200 "as necessary for discharging the encumbrance on the sale property" and mentioned negotiations with the sons of Krishnier, although he denied receipt of the Rs. 200 from the purchaser under Exhibit VI. But no issue was raised regarding this and nothing was said regarding it in argument here or apparently before the Lower Appellate Court. The appellants, with whom we are concerned, made no

suggestion that they or 1st and 2nd defendants had ever acquired any sort of legal right to a conveyance from Krishnier or that the latter or plaintiff

was under any legal responsibility to them. Their claim therefore rests only on the fact that they made payments to free property from

encumbrances in the belief that in the future they might acquire from a third party an interest in that property, by which their payments could be

justified. On these facts no authority supports their claim to reimbursement.

7. The principle relied on is an equitable one and its application cannot in the absence of clear reason be extended beyond the limits authorised by

authority. But it will be found that the cases cited as illustrating its application deal only with payments made under a mistake, not like that alleged in

the present case as to the possibility of a title being acquired in the future, but as to the validity of one regarded as already in existence; and, even

so, in each case there was distinct evidence that the mistaken belief was not a mere idle opinion, but was reached in good faith. Thus in *Neesom v.*

*Clarkson* 4 Hare 97, the payments were made by a transferee of property under a mistake as to the ownership of his transferor; but the fact that

the former had obtained possession would go far towards supporting his bona fide belief in his title. In *Butler v. Rice* (1910) 2Ch. 277 the plaintiff

was under the impression that the property, in respect of which he paid, actually belonged to Rice, not to his wife; and he had satisfied himself as to

the possession of the title-deeds and obtained a guarantee from Rice's solicitor, before making his payment. In *Tangya Fala v. Trimbak Daga*

I.L.R.(1916) 40 Bom. 646 another case of this class the mistake was regarding the actual ownership and possession had passed. In the two last

mentioned cases some argument was founded on the fact that the result of the payments relied on was not to impose a new liability on the

property, but merely to transfer an existing debt from one creditor to another. That can no doubt be said in the case before us and, if it means no

more than that in the absence of ulterior motive the good faith of the belief, under which the payment is made, can be more easily presumed, there

is no reason for dissent. But with all due respect, if the intention is to lay down an absolute rule, the general objection to allowing credit for

payments made by a stranger and the necessity for requiring some justification for his intervention would appear to have been overlooked. So far

the cases relate only to mistake as to existing titles, supported by proof of good faith by evidence as to possession or otherwise, which is wanting

in the present case, since appellants knew that they were obtaining possession from a mortgagor.

8. Where payments made as here in expectation of the acquisition of a title in future are in question, there is little or no authority. Cases similar to

Middleton v. Magney 2 H. & M. 233 where, reimbursement was not claimed from a third party or the property in his ownership, but from the

present owner in consequence of the failure of expectation that he would be able to grant a lease, are not in point. In fact the only case dealing with

facts similar to these before us is Ludlow v. Grayall 11 Price 58., where no doubt relief was given on the basis that expenditure had been incurred

on property purchased from a remainderman on the faith of his representation that the tenant for life would concur in the sale. But the decision in

inconclusive, because it was only given on an application to restrain proceedings for ejectment pending the hearing of the matter; and, even so,

there was evidence of the purchaser's good faith, since he had obtained possession and one learned judge statedly grounded his judgment on the

fact that some agreement between the remainder man and the tenant for life was established. Lastly a good deal of argument has been based on

Narayana Kutti v. Pechiammal ILR 1911) Mad. 426 but in disregard of the facts really in question and of what was really decided. A stranger had

at the instance of certain reversioners discharged a mortgage on the estate and obtained from them a sub-mortgage of the charge they thus

obtained, on which it was held that he was entitled to recover by sale of the estate in the possession of the tenants for life. It is clear that he had no

interest in the estate antecedently to or independently of his advance; and his claim so far resembled that disallowed in Veeraraghava Iyer v.

Lakshmana Iyer (1912) 25 M.L.J. 312 a fact which was recognized fully in the earlier part of the leading judgment delivered by Sundara Aiyar, J.

But the learned Judge went on to hold that reversioners are entitled to discharge debts recoverable from the estate and to obtain by doing so a

valid charge, which they can assign and which can at once be enforced by the assignee. With the correctness of this conclusion we are not

concerned at present. But it does not involve, as appellants contend, any recognition of a future and contingent interest as a possible basis for a

claim to reimbursement or any analogy with the facts now before us. These are all the authorities, which call for notice, and the result is that none

recognizes a mistaken belief in the future acquisition of an interest as sufficient to support a claim to subrogation against the actual owner; and that

such a claim is allowed, when the mistake relates to the actual, existence of an interest, only when there is ground for the allegation of good faith",

which is not available to appellants, in the absence of authority, there is no reason for extending the principle they rely on to cover their case.

9. Lastly, in the alternative, appellants contend that, if their payments do not entitle them to subrogation, they cannot be regarded as having

discharged Exhibits ii and III and that, as the latter is outstanding, the mortgagee under it is entitled to immediate possession of the property and he

alone, not plaintiff, is entitled to evict them. This is not sustainable. The fact that appellants were not entitled to redeem meant only that the

mortgagee was not bound to accept their payments, not that, if he chose to do so, the mortgage was not discharged. In this case, as in others not

covered by Section 69 or Section 70 Indian Contract Act, there is no inconsistency between the facts that a benefit has been actually conferred

and that the person who conferred it cannot recover what he spent on doing so. It is not suggested that the amount spent is not still with the

mortgagees. In the circumstances this contention also fails. The result is that the appeal must be dismissed with costs.

10. Plaintiff's assignee's memorandum of cross-objections is" 1argued against 7th defendant, who is alleged to have obstructed his attempt to take

possession of item 1 under his title as purchaser in execution of his decree against 1st and 2nd defendants. 7th defendant was placed ex-parte by

the District Munsif, but the suit as against her was dismissed on the merits. A statement of what happened in the Lower Appellate Court is

sufficient to show that its decision confirming this dismissal cannot be sustained. Plaintiff was the appellant. But for reasons, which are not clear, 1st

defendant applied in I. A. No. 191 of 1917 to have ""the ex-parte order set aside."" This application is not on the record, but the diary shows that it

was made and. allowed. It was made under Order 9, Rule 7, Civil Procedure Code, it could be made only before the trial was finished; it could

not have been made under Order 9, Rule 13, because the decree" was in 7th defendant's favour; and in either case it could be made only in the

court, where the trial was held, and the order on it was meaningless, because there was no new trial. The Lower Appellate Court next referred to a statement by the plaintiff's vakil before it that he did not ask for relief against 7th defendant; but there is no such statement on record and plaintiff's vakil here knows nothing of any and 2nd respondent's Vakil, has no information on the point. It is against all probability that such a statement was made, since the Lower Appellate Court in fact proceeded to deal with 7th defendants's case on the merits, stating that her vakil "" vaguely suggested that she persisted in her claim. On the merits, after a reference of questionable correctness to the procedure in cases of obstruction, the Lower Appellate Court said first that Krishiner was not obstructed by any third person and. next that he was not obstructed by any person not all, the former statement, if it means that 7th defendant was a party to the decree under execution, being apparently incorrect. Each step taken by the Lower Appellate Court in dismissing plaintiff's appeal against her was either wrong or unintelligible. We therefore cannot accept its decision and must set it and the whole proceedings connected with it aside. The appeal, so far as it is between plaintiff's assignee and 7th defendant, must be reheard by the Lower Appellate Court in the light of the foregoing. Costs to date there and in this Court will abide the result of the re-hearing and will be provided for in the order to be passed.