(1973) 03 MAD CK 0048

In the Madras High Court

Case No : Appeal No. 683 of 1966

K. Ambalavanan — APPELLANT

Vs

Bank of Madura Ltd. and Others — RESPONDENT

Date of Decision : 28-03-1973

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 34 Rule 1
Registration Act, 1908 — Section 17
Transfer of Property Act, 1882 — Section 59

Citation : (1973) ILR (Mad) 568

Hon'ble Judges : Natarajan, J;Ismail, J

Bench : Division Bench

Advocate : S. Rajagopalan, for the Appellant;

Final Decision : Dismissed

Judgement

Ismail, J.—The second Defendant in Original Suit No. 11 of 1960 on the file of the Court of the Subordinate Judge of Thanjavur is the Appellant herein. The Appellant is the son of the first Defendant, Kanda-swami Pillai, and the first Defendant is the son of one Neelamegham Pillai. Exhibit A-1, dated 30th November 1939 is a registered mortgage deed executed by Neelamegham Pillai and the first Defendant, the first Defendant for himself and as guardian of the Appellant, who was a minor at that time, for Rs. 60,000 in favour of one Chidambaram Chettiar. In a suit for partition instituted by the sons of Chidambaram Chettiar in Original Suit No. 42 of 1950 on the file of the Court of the Subordinate Judge, Pudukottai, the interests of the mortgagee under exhibit A-1 were allotted to the shares of Defendants 3 to 7, namely, the widow and sons of Chidambaram Chettiar aforesaid. Chidambaram Chettiar himself died on 18th June 1952. He had borrowed moneys from the Plaintiff Bank and Defendants 3 to 7 acknowledged the liability of Chidambaram Chettiar to the Bank and created on equitable mortgage by deposit of title deeds in respect of their mortgage interest under exhibit A-1 in favour of the Plaintiff Bank. For this purpose, they deposited the mortgage deed, exhibit A-1 itself with the Plaintiff.

This deposit took place on 3rd February 1953 at the Head Office of the Bank at Madurai. The Plaintiff-Bank wrote a letter, dated 3rd February 1953, marked as exhibit A-10, addressed to the fourth Defendant, acknowledging the receipt of the document of title. On the next day, that is, on 4th February 1953, a letter was written by all the five person namely. Defendants 3 to 7, addressed to the Agent of the Bank of Pudukottai referring to the deposit of exhibit A-1 as a title deed, with intent to create a mortgage in respect of the amounts due by Chidambaram Chettiar, subsequently acknowledged by them, to the Bank. That letter is marked as exhibit A-11. It was thereafter the present suit was instituted by the Bank impleading the father of the Appellant and the Appellant as Defendants 1 and 2 and the widow and the sons of Chidambaram Chettiar as Defendants 3 to 7 and three other persons who claimed interest in the properties by virtue of subsequent alienations. The prayer in the suit was that the amount due under the mortgage deed referred to in paragraph 3 of the plaint, namely, exhibit A-1 be declared to be Rs. 1,58,900 as on the date of suit and for payment of Rs. 68,576-84 as detailed in the plaint to the Plaintiff for the amount due on the promissory note, dated 11th January 1951 with interest at the contract rate and terms from the date of suit to that of payment together with costs within a time to be fixed by the Court; in default to pass a final decree for sale of the property detailed in the schedule, the decree being in terms of Form No. 11, Appendix D of the Code of Civil Procedure. The suit was resisted principally by the Appellant herein. He put forward several contentions, such as, that exhibit A-1 mortgage was not supported by consideration; that there was a partnership between Chidambaram Chettiar and the first Defendant and it was only with reference to that partnership, the promissory note for Rs. 25,000 was executed by the first Defendant in favour of Chidambaram Chettiar; that some property was purchased in the name of Chidambaram Chettiar by the first Defendant for Rs. 40,000, which was subsequently sold by Chidambaram Chettiar for a sum of Rupees one lakh; that thereby Chidambaram Chettiar made a profit of Rs. 60,000, which, in any event, was sufficient to discharge the amount due by the first Defendant to Chidambaram Chettiar; that consequently Chidambaram Chettiar himself had no right to claim any amount from the first Defendant and that, therefore, the mortgage created by Defendants 3 to 7 in favour of the Plaintiff was not supported by consideration and that no amount was due to the Plaintiff. Subsequently, he filed an additional statement raising new contention. Based upon these pleadings, the trial Court framed the following ssues:

(1) Is the suit mortgage, dated 30th November 1939 true, valid and supported by consideration binding on the 2nd Defendant?

(2) Is the mortgage discharged as pleaded by 2nd Defendant?

(3) Is the suit barred by limitation as against a half share of the hypothecs as pleaded by the 2nd Defendant?

(4) Is the 2nd Defendant not entitled to the benefits of Madras Act IV of 1938?

(5) To what equities, if any, are Defendants 8 and 10 entitled?

(6) Whether the property purchased by the 9th Defendant is not liable to be proceeded against for the suit claim?

(7) To what relief is the Plaintiff entitled?

Additional Issue:

(1) Is the Plaintiff not entitled to sue on the original mortgage bond, dated 30th November 1930 without a registered assignment deed in its favour

The learned Subordinate Judge of Thanjavur, who tried the suit, came to the conclusion that the suit mortgage, exhibit A-1, dated 30th November 1939, was true, valid and supported by consideration and was binding on the second Defendant. The learned trial Judge found against the case of the second Defendant with regard to the partnership, the alleged discharge of the mortgage as well as the contention that the suit was barred by limitation and the second Defendant was an agriculturist. With reference to the additional issue, the learned trial Judge, following a decision of a Full Bench this Court in Chinnah v. Subramania I.L.R (1959) Mad. 359, held that without any deed of assignment in its favour, the Plaintiff was entitled to institute the suit in question,, with reference to the original mortgage itself. In the result, the suit was decreed as prayed for and Defendants 3 to 7 were declared to be entitled to the surplus, if any towards the discharge of their debt under exhibit A-1. It was further decreed that the balance would go to Defendants 8 and 10 and the further surplus would go to the mortgagors. It is against this judgment and decree that the present appeal has been preferred by the second Defendant in the suit.

2. Mr. S. Rajagopalan, learned Counsel for the Appellant, raised three contentions before us, namely,

(i) Exhibit A-1, mortgage was not supported by consideration and the same is not binding on the Appellant; (ii) there had been no valid equitable mortgage created by defendents 3 to 7 in favour of the Plaintiff-Bank, since exhibits A-10 and A-11 required registration and they had not been registered; and (iii) the Plaintiff could not institute a suit on the original mortgage, exhibit A-1, dated 30th November 1939, without there being a registered assignment of the said mortgage in its favour. We shall consider these points in seriatim.

3. As far as the first point is concerned, it is necessary to refer to the items of consideration which con stituted the debt due under the mortgage. The consideration consisted of three items, nemely (1) a sum of Us. 15,000 due to one Maruthappa Pillai of Karunthattangudi to wards a promissery note, dated 9th January 1938, marked as exhibit A-2 and a security bond, dated 20th January 1985, marked as exhibit A-13; executed by the first Defendant (ii) a sum of Rs. 25,000 due to Chidambaram Chetiiar on a promissory note executed by the first Defendant on 13th August 1939, namely, exhibit A-3, and (iii) a cash consideration of Rs. 20,000 received by the first Defendant at the time of

executing exhibit A-1 mortgage, for discharge of his antecedent debts and for family expences.

4. As far as the first item of consideration is concerned, as we have already pointed out, exhibit A-2 is the promissory note executed by the first defen dant in favour of Maruthappa Pillai and exhibit A-13 the registered security bond executed by the first Defendant in favour of Maruthappa Pillai. The mortgage deed, exhibit A-1, directs the mortgagee Chidambaram Chettiar to discharge the amounts due to Maruthappa Pillai. The endorsement, dated 21st April 1941 shows that a turn of Rs, I7,948 was received by Maruthappa Pillai and cancelstion was given of the promissory note as well as the security bond executed by the first Defendant, exhibit A-14 being the endorsement of discharge signed by Maruthappa Pillai. With regard to the actual execution of the promissory note, exhibit A-2, and the passing of consideration, thereunder, P.W. 2, a resident of Karuthathengudi, has given evidence. He has attested the promissory note exhibit A-2 in favour of Maruthappa Pillai. As a matter of fact, he stated that it was he who recommended to Maruthappa Pillai to advance the loan to the first Defendant. P.W. 7 has attested exhibit A-15, a registered release deed executed by Maruthappa Pillai on 23rd April 1941 in favour of Chidambaram Chettiar releasing his rights under exhibit A-13. Consequently, the execution of the promissory note, exhibit A-2, as well as the passing of consideration and the discharge of that promissory note debt by Chidambaram Chettiar the mortgagee under exhibit A-1, have been fully established.

5. With regard to the wooed item of consi-deration, namely, the promissory note executed by the first Defendant in favour of Chidambaram Chettiar under exhibit A-3, dated 18th August lose, P.W. 1, an attestor to the said promissory note has been examined and he has deposed to the execution of the promissory note by the first Defendant and the passing of ''consideration thereunder from Chidam, Vararo Chettiar to the first Defendant, The deed directs Chidambaram Chettiar to adjust the said sum of Rs. 25,000 towards the amount due to him tinder exhibit A-3. Consequently, the reality of the debt under exhibit A-3 promissory note as well as the discharge pursuant to the mortgage have been established.

6. Then, there remains the last item of consideration of Rs. 20,000 which, according to the recitals of exhibit A-1, was received by the first Defendant for discharging his antecedent debts as well as for family expenses. The receipt of Rs. 20,000 by the first Defendant on the date of the execution of exhibit A-1 has been spoken to by P.W. 1 himself. He has stated that it was he who took the money from Chidambaram Chettiar for payment to the first Defendant at his house at Pallagraharam, on his executing exhibit A-1 mortgage deed. Therefore, the payment of Rs. 20,000 by Chidambaram Chettiar fro the first Defendant on the date of the execution of the mortgage has also been proved.

7. Then, the question for consideration is whether these items of consideration can be said to be binding on the Appellant herein so as to make the mortgage itself binding on him. Irrespective of any other consideration, as far as the

amount due to Maruthappa Pillai under exhibit A-2 promissory note and the amount due to Chidambaram Chettiar under exhibit A-3 promissory note are concerned, they will certainly constitute antecedent debts of the first Defendant and therefore to that extent, the mortgage will be binding on the Appellant. That leaves the question as to whether the mortgage will be binding with reference to the sum of Rs. 20,000 received in cash by the first Defendant on the date of exhibit A-1. As we have pointed out already the mortgage deed recites that the said amount was received by the first Defendant for discharging his antecedent debts as well as for family expenses. There is no evidence to show, what portion of the amount was utilised for the discharge of the antecedent debts and what portion of the amount was spent towards the family expenses of the first Defendant Mr. Rajagopalan, learned Counsel for the Appellant repeatedly contended that there is a finding of the trial Court that the cinema business was not Kula-chara of the first Defendant and there is evidence to show that the first Defendant started his cinema business, which ended in a loss. However, there is absolutely no evidence to show that the said sum of Rs. 20,000 borrowed by the first Defendant from Chidambaram Chettiar was utilised for the cinema business. Only if that amount is proved to have been utilised for the cinema business, there will be scope for argument that the amount having been borrowed for a business which is not a family business, the said debt cannot be said to be binding on the Appellant. The Appellant in his evidence has stated that the cinema business was in 1942 or 1943; that he is not definite and that it lasted till 1949 or 1950. The mortgage being in 1939 and the amount having been borrowed in 1939 itself, unless there is specific evidence to show that that amount was retained the first Defendant till he started the cinema business in 1942 or 1943 and was utilised in the said cinema business, it is not possible to hold that the said sum of Rs. 20,000 was borrowed and utilised for the said cinema business which is not the kulachara of the family, and therefore the said debt would not be binding on the Appellant herein. On the other hand, as we have pointed out already, there is a specific and clear recital in exhibit A-1 itself to show that the said sum of Rs. 20,000 was received by cash by the first Defendant for the discharge of his antecedent debts and for family expenses. If that reoital is true, certainly the Appellant will be bound by the mortgage to the entire extent. The mortgage deed being of the year 1939 and Chidambaram Chettiar having died by the time the suit was instituted, the only other person who could have given any evidence with regard to the circumstances under which the sum of Rs. 20,000 was received by the first Defendant was the first Defendant himself, who, for reasons best known to himself, avoided the Court and did not give any evidence in this behalf. Having regard to the long laspse of time between the execution of exhibit A-1 and the date of the suit, the prima facie conclusion is that the recital contained in exhibit A-1 is a true recital. Certainly it is open to the Appellant herein to establish that the said recital is a false one by specific evidence. There is absolutely no such evidence in this case. Apart from this, it should be remembered that the obligation imposed by law on an alienee is to make bona fide enquiries as to the neoessity for the alienation and not to see to the application of the money actually lent or paid by him. In this particular case, there is the promissory note executed in favour of Maruthappa Pillai as well as the promissory note executed in favour of the mortgagee himself, which were discharged by the execution of the mortgage. Therefore, the mortgagee would have reasonably and bona fide believed the representation made by the first Defendant and the recital contained in exhibit A-1 to the effect that he was receiving the cash consideration of Rs. 20,000 for payment of his antecedent debts and family expenses. Under these circumstances, we hold that the entire mortgage exhibit A-1 is binding on the Appellant as well as his father, the \\ first Defendant. Hence there is no substance in the first point.

8. As for as the second point urged by the learned Counsel for the Appellant is concerned, that will depend upon the language of exhibits A-10 as well as exhibit A-11. Before proceeding to deal with that language, we shall refer to the legal position in this behalf.

9. A mortgage by deposit of title deeds does not require any writing and being an oral transaction is not affected by the law of registration. But it is usual for the deposit to be accompanied by a memorandum in writing. If this writing is the contract of mortgage so that it creates the mortgage it must be registered and oral evidence to contradict it is not admissible. But registration is not necessary if the mortgage is complete without the writing and the writing is merely a statement that the mortgage has been effected or a statement of facts from which the contract of mortgage can be inferred. It is in view of this alone, the Supreme Court in Rachpal Mahraj Vs. Bhagwandas Daruka and Others, has stated as follows:

The crucial question is Did the parties intend to reduce the bargain regarding the deposit of title deeds to the form of a decument? If so, the document squires registration. If, on the other hand, its proper construction and the surrounding circumstances lead to the conclusion that the parties did not intend to do so then, there being no express bargain the contract to create the mortgage arises by the implication of the law from the deposit itself, with the requisite intention, and the document itself, being, merely evidential does not require registration.

Consequently, the necessity for registration depends upon the construction of the memorandum in the light of the surrounding circumstances.

10. It is against this background alone, we refer to the language of exhibits A-10 and A-11. As we have pointed out already, exhibit A-10 is a communication, dated 3rd February 1953 addressed by the Secretary of the Plaintiff-bank to the fourth defen dant. That states:

Dear Sir,

We have this day received the following documents deposited by you as security towards the dues of late Mr. P. RM. RMST. Sithambaram Chettiar:

''Mortgage deed executed by Messrs V. Neelamegham Pillai, N. Kandaswamy Pillai for self an as guardian of Minor Ambalavanan in favour of Mr. P. RM. RM. ST. Sithambaram Chettiar and registered as Document No. 1616 of 1939 in Book No. 1 pages 376 to 383 on 8th December 1939 in Karuntattangudi Sub-Registrar Office.''

Yours faithfully, Sd. Secretary

Exhibit A-11, dated 4th February 1953 is a communi-sation sent by the Defendants 3 to 7 addressed to the Agent, Bank of Madura Limited, Pudukottai and the same is as follows:

Dear Sir,

Late Mr. P. RM. RM. ST. Sithambaram Chettiar had borrowed from the Bank Rs. 1,90,000 (Rupees one lakh and ninety thousand only) and we are liable to pay the amount as his legal heirs and representative and Rs. 1,78,794-7-0 (Rupees one lakh, seventy-eight thousand seven hundred and ninety-four and annas even only) is due to the Bank on that Account as on 3rd February 1953- We have further, for that purpose, deposited yesterday, the following documents add title deeds in Madurai with your Head Office with intent to create an equitable mortgage as already agreed to between us and the Bank: Mortgage deed, dated 30th November 1939 executed by Messrs. V. Neelamegham Pillai, N. Kandaswamy Pillai, for self and as guardian of minor Ambalavanan in favour of Mr. P. RM. RM. ST. Sithambaram Chettiar and registered as Document No. 1616 of 1939 in Book No. 1 Pages 376 to 383 on 8th December 1939 in Karuntattangudi Sub-Registrar''s Office.

Yours faithfully, (Sd.) Sitha Meenakshi S. Raman S. Lakshmanan S. Raman as guardian for minor Mumgappan and Nataraja

As perusal of these two documents clearly shows that on 3rd February, 1953, the mortgage deed, exhibit A-1, was deposited by Defendants 3 to 7 with the Bank at Madurai an security for the dues of late Chidambaram Chettiar to the Bank. Consequently the transaction of creating a mortgage namely, depositing of the title deeds with intent to create a security thereon for the debts due by Chidambaram Chettiar, to the Bank had already taken place, that is, prior to the writing of exhibit A-10 itself on 3rd February 1953. This is made simply clear by the language in exhibit A-10. further it has to be noticed that exhibit A-10 has been sigued only by the secretary of the Bank and not by Defendants 3to 7. It is only exhibit A-II which has been signed by Defendants 3 to 7 (the fourth Defendant sign in as guardian for Defendants 5 and 6 who were minors at that time). In view of this alone, Mr. Rajagopalan contended that exhibit A-10 and A-11 must be read together and if they are so read they would constitute one transaction signed by Defendants 3 to 7, and therefore the same required registration. In support of his contention, the learned Counsel relied on three decisions.

11. The List decision is Jagannadhan Pillai v. Official Assignee, Madras 60 M.L.J. 303. The head-rote to that decision, on which reliance is placed is:

Where a promissory note was executed by a person on the 25th of May, 1923, for a certain amount, and he executed on the following day (26th) an agreement to deposit title-deeds and on the 27th he sent the title deeds with a letter whose wording was as follows:'' I have the honour of herewith sending you with the intention of deliver-is and depositing the same with you as per the memorandum, dated the 26th of May 1923, executed by me in your favour the title-deeds and papers relating to the property, and referred to the schedules annexed to the letter, the question to be decided, in order to discover whether or not the mortgage was valid, was whether the letter required registration as embodying a bargain between the parties.

Held, that, since the letter made reference to the memorandum of agreement of the previous day, the two documents must be read together, and when so, read, they constituted a document within the terms of Section 17 of the Indian Registration Act, and there fore,the mortgage was invalid for want of registration.

It will be immediately seen that the extract, from the letter itself makes it clear that the depositing of the title deeds and the writing of the letter were contemporaneous and independent of the letter there was no creation of a mortgage and therefore it was held by the Court that the letter made reference to the memorandum of agreement of the previons day and the two documents must be read together and when so read they constituted a document within the terms of Section 17 of the Indian Registration Act and therefore the mortgage was invalid for want of registration. From the language of Exhibits A-10 and A-11 in the present case, it will be seen that decision has no application to the facts of the present case.

12. The next decision relied on by the learned Counsel for the Appellant is Modem Housing Construction and Properties Limited v. The Alagappa Textile (1972) 2 M.L.J. 309>

The relevant portion of Exhibit P-3 in that case was:

Besides, I, Dr. RM. Alagappa Chettiar hand over to you my title deeds relating to the guest house by way of further security in respect of the aforesaid liability.

The relevant portions of subsequent memoranda, Exhibits P-7 and P-42 in that case were:

I hereby agree that the title deeds of house property already deposited with the company will remain with them as collateral security for the above promissory note until it is fully discharged.

After pointing out that the real test to find out whether a memorandum requires registration or not, is to ascertain whether the memorandum represent, the bargain between the parties, the Bench held that the language of the aforesaid documents, namely, Exhibits P-3, P-7 and P-42 left no room for doubt that the memoranda exhibits P-7 and P-42 required registration. As we have pointed out already, whether a particular document requires registration as consfcitu-ing the entire bargain between the parties will depend upon the construction of that document and the terms of that document and having regard to the language on Exhibits A-10 and A-11 in the present case, we are of the opinion that the said decision has no application to the facts of the present case, since the language of Exhibits A-10 and A-11 does not show that the parties intended that the said communi-cations alone should constitute the bargain between the parties as constituting the contract.

13. The last decision is that of the Supreme Court in Veeramachineni Gangadhara Rao Vs. The Andhra Bank Ltd. and Others, Realiance was placed on the proposition of law referred to in paragraph 17 at page 1619. The Supreme Court in that paragraph merely referred to end relied on its own decision in the earlier case which we have already referred to, and extracted the proposition of law laid down by the Court in that decision in the said paragraph. Consequently, this decision does not throw any further light on the question before us.

14. Having regard to the language of exhibits A-10 and A-11, which we have already extracted, we are clearly of the opinion that the said two documents did not constitute the bargain between the parties and the contract between the parties had already been constituted when Exhibit A-1 was deposited by Defendants 3 to 7 with the Plaintiff-bank at its Head Office at Madurai and exhibits A-10 and A-11 merely made a reference to a transaction already completed and they did not themselves bring into existence the mortgage created by defendents 3 to 7 in favour of the Bank. Hence, we hold that there is no substance in this point also

15. Then, there remains the last point raised by the learned Counsel and that requires the consideration of two aspects. One is, in what manner a sub-mortgage, as has been created by Defendants 3 to 7 in favour of the Plaintiff, can be created in law and the second is, whether a sub-mortgagee, namely, the Plaintiff-Bank can institute the present suit for taking of accounts between the original mortgagor and the mortgagee. As has been very pithily put in Fisher and Lightwoods'' Law of Mortgage, eighth edition at page 219.

16. A sub-mortgage is a mortgage of a mortgage. A Full Bench of this Court in Chinnah v. Subramania ILR (1959) Mad. 369. to which we have already made a reference pointed out as follows:

A debt secured by a mortgage being the property of the mortgagee, he can, in his turn assign or create a security over it. If he chooses to create a mortgage over it, such a mortgage is called a sub-derivative mortgage. This sub-mortgagee will have the security of the mortgage right created by the original mortgage for the payment of his debt. In relation to the submortgage, the mortgagee will be the mortgagor. He will therefore have a right to pay off his debt and redeem the property.

It is settled that the interest of a mortgagee in the mortgaged property is itself an immovable property. Consequently, all the provisions of law applicable to the creation of an original mortgage will be available and apply to the creation of a sub-mortgage by a mortgage. Therefore, there is nothing in principle to militate against a mortgagee creating a sub-mortgage of his interest in the mortgaged property by depositing the title deed, which in the present case is the registered mortgage deed executed in his favour namely, exhibit A-1. However, if the original mortgage itself as is mortgage by deposit of title deeds, a sub mortgage can be created by the mortgagee re-depositing the title deeds with the sub-mortgagee. It is this position that has been stated in Fresher and Lightwood''s Law of Mortgage Eighth Edition at page 220 as follows:

An equitable submortgage may be made by deposit of the mortgage deed or, where the principal mortgage is on equitable mortgage, by redeposit of the deposited title deed of debts, with or without an accompanying memorandum.

17. The earliest decision which had to consider thia question was that of the Calcutta High Court in Gokul Dass v. Eastern Mortgage and Agency Company ILR 33 Cal. 410. In that case, the parties referred to as Roys, some time before June 1893 mortgaged for a sum of Rs. 3,35,100 in favour of one Dhanpat Singh. On the 3rd June 1893 the said Dhanpat Singh denosited the mortgage deeds with Gokul Dass''s agent in Calcutta as security for his debts due to Gokul Dass. On 19th June 1893 Dhanpat Singh wrote a letter to the agent of Gokul Dass, which after reciting the amount of the debt contained amongst others, the following clauses:

that I shall pay him one fourth of Rs. 70,000 Within a fortnight, one-fourth by promisaory note payable six months form date, and the remaining half by a promissory note payable within a year. In the meantime and untill payment of the claim in full of Raja Gokul Dass, you will hold as agent for him the mortgag kist-bandi, dated 25th Falgun 1292, executed in may favour by Babu Bhagubatty Charan Roy and others as enumerated below, which I have already made over to you as such agent as aforesaid as security for the due payment of the said, debt, not to be parted with by you without mutual consent of myself and Raja Gokul Dass or under an order of Court.

The question for consideration, was, whether the letter, dated 19th June, 1893, required registration and whether there had been a valid creation of a submortgage by depositing the original mortgage deed. The Calcutta High Court held that on 3rd June 1893, when the mortgage deed was deposited, there was a concluded contract and was a valid mortgage u/s 59 of the Transfer of Property Act and the communication, dated 19th June 1893, did not require registration u/s 17 of the Registration Act. The Court pointed out:

The letter of the 19th speaks of the sub-mortgage as having been already made and was written by Dhanpet Singh as the suggestion of the pleader Srish.

Chandra Chowdhury as on admission by him that this sub-mortgage had been created. Reliance has been placed upon a passage in the letter that the deeds were not to be parted with without the mutual consent of himself and the Plaintiffs or under an order of the Court. It is said that this shows that Dhanpet Singh still retained control over the deeds, but it is clear that this is not what was intended. It was probably only meant that the Plaintiffs were not to part with the deeds without giving Dhanpet Singh an opportunity of paying off their debt and getting them back, as the debt of the Roys to him was so much greater than his debt to the Plaintiffs. We entirely agree, therefore, with the Subordinate Judge in holding that a good equitable sub-mortgage was created in favour of the Plaintiffs on the 3rd June 1893 that the object of the letter of the 19th June 1893 was not to constitute the contract between the parties but was written with the objectand for the purpoase we have stated, and that, consequently it did not require registration u/s 17 of the Registration Article

18. In U. Thit v. V. Paw and Ors. AIR 1935 Bang. 483, the Court pointed out that if a mortgage can be made u/s 58 (f), Transfer of Property Act, by deposit of title deeds, so, naturally, can a sub-mortgage be made in the same way, for there is no difference whatever between the original creation of a mortgage and the assignment of that mortgage by way of sub-mortgage; both are mortgages of immovable property. That was also a case in which a sub-morgtage was created by deposit of title deeds and the question that come to be considered was whether that was sufficient to create a valid sub-mortgage. The Court held that for the reasons referred to above that constituted the creation of a valid sub-mortgage.

19. The decision of Rangoon High Court in Maung Thaung v. M.M.K. Chettiar Firm AIR 1936 Rang. 366 is directly in point. That was a case where the original mortgage was by a registered instrument. The mortgagee created a sub-mortgage by depositing the mortgage deed. The question for consideration was whether the said sub-mortgage was valid in law or did it require a separate document. The point raised before the Court was referred to in the judgment as follows:

The point of law that is now raised is that the sub-mortgage not having been created by a registered deed was void in law.

The Court referred to its earlier judgment in Appeal No. 178 of 1934 and relied on the following passage in that judgment:

A mortgage of immovable property is itself an interest in immovable property and can be itself mortgaged. The transaction is called a sub-mortgage.

It would appear prima facie that such a sub-mortgage can be made by deposit of title-deeds in exactly the same way as an original mortgage can. Admittedly in England (where the corresponding terms are ''equitable mortgage'' and ''sub-mortgage'') equitable sub-mortgages of equitable mortgages can be made. Vide (Smith v. Hildyar) Ex parte 2 K.B. 16.... I can see no reason why a sub-mortgage by deposit of title deeds in the case where the original mortgage has been by deposit of title deeds should not be valid. This appears to be clearly in accordance with law nor has any reason of practice or convenience been argued against it.

This case is stronger than that case because in the present case the original mortgage, that is, the mortgage created by the Appellant in favour of Maung Mya an I Ma Kha, was by a registered deed. The registered deed thus became, so to speak, the document of title to whatever interest Maung Mya and Ma Kha had in the suit property and they could quite validly create a mortgage of that interest by the deposit of that registered deed. That is what they have actually done in this ease.

We are clearly of the opinion that the conclusion of the learned Judge in that case, if we may lay so with respect, correctly represents the legal position and it directly applies to the facts of the present case.

20. The decision in Appeal No. 178 of 1934, referred to and relied on in the above decision has been reported as Gurnam Kaur v. R.K. Benerjee AIR 1973 Rang. 69, which dealt with a case of a sub-mortgage by deposit of title deeds where the original mortgage itself was by deposit of title deeds.

21. Then there is a decision of this Court in S.Rm.M.Rm. Ramanathan Chettiar late a minor by guardian Muthayi Achi alias Chittal Achi and Another Vs. His Highness Maharana Shri Dowlat Singjee, Thakore Sahib of Limbdi represented by his agent Mr. V.C. Gopalaratnam, Advocate, High Court and Others, . In that Case a Bench of this Court, after referring to the decision of the Rangoon High Court in Gurnam Kaur v. R.K. Banerjee AIR 1937 Rang. 69 referred to above pointed out:

We entirely agree with the above opinion of the learned Judge. If in law a mortgagee''s interest in properly can be created by the mere deposit to him of title deeds of the mortgagor, we see no reason why the mortgagee''s interest thus created cannot be sub-mortgaged by depositing the very title deeds the deposit of which with him created his interest in the property. We cannot find anything in Section 58 01 Clause (f) T.P. Act, against the validity of an equitable sub-mortgage of a mortgage created by deposit of title deeds. In England there never was a doubt about the validity of such a sub-mortgage. In our opinion the 3uit submortgage is true and valid in Jaw.

The principles laid down in the above decisions make it absolutely clear that Defendants 3 to 7 in the present case created a valid sub-mortgage in favour of the piaintiff by depositing exhibit A-1, mortgage deed in favour of Chidambaram Chettiar, which was the title deed of the mortgagee with regard to his interest in the mortgaged property.

22. That takes us on to the second aspect of the mat tor namely, whether the Plaintiff can institute the present suit with reference to exhibit A-1 mortgage itself.

23. The earliest case concerning the position of a mortgagor a mortgage and a sub-mortgagee came to be considered by the Bombay High Court in Narayan Vithal Mavel. v. Ganoji ILR 15 Bom. 692. That related to a suit for redemption of land which had been sub-mortgaged by the mortgagee, in which suit the sub mortgagees were co-Defendants, and the mortgage prayed for an account to be taken of the sub-mortgage. The question was, whether such a prayer could be granted. The Bombay High Court pointed out:

We think that this claim of the mortgagee is well founded, and that the case must be remanded for an account of the sub-mortgage to be taken. This is the course followed in England. In the case of a derivative mortgage of sub-mortgage the judgment directs an account of what is due to this original mortgagee or his assignee, and then of what is due to the derivative or sub-mortgagee; and that upon payment to the latter of the sum due to him, not exceeding the sum found due to the original mortgagee, and on payment of the residue, if any, of what is due to the original mortgagee both of them shall reconvey to the mortgagor.

24. In Muthu Vijaya v. Venkatachallam Chetty I.L.R 20 Mad. 55 this Court stated:

The original mortgagor and the sub-mortgagee, as the holders of different interest in one and the same specific property, stand to one another in a relation that gives rise to certain rights duties and interest. It is admitted that a mortgagor whose right to redeem originally existed as against the mortgagee alone, becomes by virtue of the sub-mortgage entitled to exercise that right as against the sub-mortgagee also, who consequently, must be made a party to redemption proceedings. Now, as the sub-mortgagee may be redeemed by the original mortgagor, it ought to be held that the former may foreclose the latter, where that relief can be claimed, or, where such relief cannot be granted, he may obtained an order for sale and put an end to the other party''s right; to redeem. Further it is only just and reasonable that whilst the law, on the one hand, recognises a right in the original mortgagor to redeem the sub-mortgage, it should give the latter, as against the former, the generally correlative right.

The same view was reiterated by this Court in T.S. Moidheen Pichai Sahib Vs. Nagoore Meera Rewther and Others, . In that case a sub-mort gagee sued for sale of the property impleading both the mortgagor and mortgagee. The Court decreed the suit on the claim of the sub-mortgagee which was smaller than the amount due on the mortgage. The mortgagee thereafter filed his suit on the mortgage. It was held that the cause of action for the two suits were different and that the decision in the former suit would not operate as tea judicata in regard to the latter suit.

25. In A.L.A.R.R.M.V. Vellayan Chettiar Vs. Mahalinga Pathan and Others, , this Court pointed out:

Ordinarily a sub-mortgagee''s right just like any other mortgagee is to enforce his mortgage and bring to sale the property mortgaged to him, that is the interest of the mortgagee in the property mortgaged to the latter. But the law permits him to enforce sale of his said property under circumstances and conditions which would entitle the original mortgagee to bring the properties to sale. To such a suit the original mortgagor should be made a party. The principles on which this is- allowed is that a submortgagee''s claim is by a derivative title from the mortgagee and he is in fact an assignee of the mortgagee. When the mortgagee effects a mortgage of his mortgage interest he is creating a transfer of his rights as mortgagee though not absolutely. Therefore when a sub-mortgagee sues for sale of the property he is enforcing the right of the original mortgagee.

26. In Vengannan Chettiar and Sons v. Ramaswami Pillai ILR (1944) Mad. 104 originally a sub-mortgagee filed a suit impleading both the mortgag3 and mortgagor praying for sale of the mortgaged property. The plaint was sought to be amended by a bandening the relief as to sale of the property and restricts goes to sale of the mortgage right. A Bench of this Court hold that the amendment seeking a different relief was based on the same cause of action, namely the sub-mortgage. This Court observed:

A sub-mortgagee has two courses open to him. He can, if he wishes, limit his suit to the sub-mortgagor in which case he only asks for the sale of the submortgagor''s interest in default of payment of the decretal amount. On the other hand, he may join the original mortgagor and ask for a decree for the sale of the mortgaged property in default of payment. In this case, the relief to which he is entitled is to be gathered from Form No. XI in Appendix 9 to the Code of Civil Procedure.

All these cases were considered by a Full Bench of this Court in Chinnah v. Subramania ILR (1959) Mad. 369 referred to already. The Full Bench, after observing what we have already extracted, pointed out

There wall be a corrsponding right in the sub-morts gagee to sue on the sub-mortgage and to enforce the sub-mortgage as against the security, that, is, the mort-gage right. In neither of these proceedings will the mortagagor be interested. Order XXXIV Rule 1 CPC states that all persona interested in the mortgage security or in the right of redemption should be jointed in a suit relating to a mortgage. In a sub-mortgage the only person interested in the mortgage secuirty is the submortgagee and the person interested in the right of redemption would be the mortgagee. The mort-gagor will not be a necessary party to either of the suite mentioned above.

The mortgagor who has a right to redeem hit mortgage cannot be deprived of his right to redeem by the creation of a sub-mortgage by his mortgagor. The redemption of the mortgage will put an end to the Sub-mortgage and the sub-mortgagee being a person interested in the mortgage right would be a necessary party to a suit for redemption by the mortgagor. The sub-mortgagee who, to a limited extent, is an assignee of the mortgage right will have a corresponding rights sue the mortgagor by reason of his derivative title.

In enforcing his sub-mortgage he can bring to sale the properties mortgaged of his mortgagor vis. the mortgagee, instead of merely bringing to sale the interest of the latter. In such a case the form of the decree would be to, direct an account being taken, between, the mortgagee and the mortgagor and also between the sub-mortgagee and the, mortgagee, and declare their respepctive rights in. the sale proceeds of the mortgaged property.

This is what exactly the Plaintiff has prayed for it the present and a decree has been granted by the trial Court. The principle underlying the abovec decision is this:

The rights of the sub-mortgagee as against his mortgagor, and as against the, original mortgagor are, though arising out of the same transaction, distinct and based on different legal grounds. As against hip mortgagor, the rights of the sub-mortgagee. are based on contract, the mortgage being a security for the loan advanced to the mortgagor. It is open to the submortgagee, in enforcement of this, right, to- proceed against the mortgagee interest belonging to his mortgagor, and to such a suit the original mortgagor is not a neceasary party; But the sub-mortgage also operates, as an assignment of the mortgage interest of his mortgagor, and by reason of this privity of state, he has certain rights and obligations as against the original mortgagor The original mortgagor can redeem the mortgage- created by him, and on such redemption, the sub-mortgage which: is dependent on it must also come to an end Conversely*, the sub-mortgagee can, in has character as assignee of the interest of his mortgagor, proceed against the prop-perty for the satisfaction of his claim, and to such a suit, the original mortgagor is a necessary party. Both these remedies are open to the sub-mortgages but they are distinct and alternative. (Mulla on tile Code of Civil Procedure, volume II thirteenth Edition. Page 1432).

Thus, when a sub-mortgagee claimes such relief, he does not claim the relief at assignee of the original mortage, but only as derivative or sub-mortgage mortgagee by reason of privity of estate referred to above, and, therefore, there is no substance in the Contention of the learned Counsel for the Appellant that the sub-mortgages, namely, the Plaintiff in the present case cannot ask for such a relief without obtaining a registered assign-ment of the original mortgage. The decree passed by the trial Court is fully in accordance with the law laid down by the above Full Bench decision. Consequently, we hold that there is no substance in this point also.

27. No other point was urged before us.

28. It is represented to us that the fifth Respondent in this appeal is dead and no steps have been taken to bring his legal representative on record. Since we are dismissing the appeal itself on merits, it is unnecessary to say anything more in this behalf.

29. Under these circumstances the appeal fails and is dismissed with costs of the Plaintiff-first Respondent.

