(1912) 11 MAD CK 0022

In the Madras High Court

K. Lakshmana Iyer and Another — APPELLANT

Vs

Sankaramurthi Pillay and Others — RESPONDENT

Date of Decision : 27-11-1912

Acts Referred:
Transfer of Property Act, 1882 — Section 55

Citation : 18 Ind. Cas. 199

Hon'ble Judges : Miller, J;Abdul Rahim, J

Bench : Full Bench

Judgement

Miller, J.—The question in this appeal is a question of priorities. The second defendant sold to his other co-parceners his one-sixth share of

the family property for Rs. 70,000 and obtained a mortgage bond in 1894, The sale-deed is Exhibit H. We are concerned with that portion of the

price, Rs. 70,000 which was not paid to the seller at the time. The deed contained a statement that that Rs. 7000 had been reserved on account of

a hypothecation bond "" that has to be executed by you to me."" That was in August 1894. Then, in November 1894, the plaintiff obtained a

mortgage (Exhibit A) of some of these properties; and on the 12th December 1894, the 1st defendant gave to the 2nd defendant a mortgage

(Exhibit II) of some of the properties in Kamsapuram, which were some of the properties of which the one-sixth share was sold in August. Now,

the question is, whether by reason of the prior agreement before this mortgage (Exhibit II, I ought to have said,, was executed in pursuance of the

agreement in Exhibit H), whether by reason of the existence of this agreement before the mortgage to the plaintiff, the mortgage Exhibit II should

not be held to have priority over that of the plaintiff. The Subordinate Judge has found and, I think he is right, that, at the time of the plaintiff''s mortgage, the plaintiff must be taken to have had notice that Rs. 7,000 of the sale amount remained unpaid, and to have known that the vendor, the

2nd defendant had a charge upon the property sold to the extent of the portion of the price which remained unpaid. The Subordinate Judge holds

that the mortgage to the plaintiff must be postponed to the extent of the prior charge known to him and the effect of that is that the mortgage Exhibit

II will take priority over the plaintiff''s mortgage on one-sixth of the Kamsapuram properties encumbered by it. The appeal is by the plaintiff. The

first argument I shall deal with is the contention that one co-parcener cannot sell his share to another, and consequently that there could be no

charge upon the property u/s 55 of the Transfer of Property Act. Now, it is clear, I think, and it was not denied, that a co-parcener can alienate or

get rid of his share to other co-parceners, not necessarily to them all jointly but to one whom he chooses or to some out of the whole body. But it

was urged that he cannot do this by way of sale but by way of surrender. But it seems to me that, if the transaction takes the form of a sale and is

for valuable consideration and if the other co-parcener accepts the transfer as a sale, there is no reason why we should not attach to the

transaction, whether it is called a surrender or whether it is called a sale, the effect which the Transfer of Property Act gives to a sale. The 2nd

defendant by Exhibit H certainly purported to sell for a price of Rs. 70,000 his share of the joint property and the fact of the transaction was that of

his share of the joint property was transferred to his co-parcener. I think it is clear at the present day that it cannot be said in this presidency that a

co-parcener has no share which he could sell. There is no doubt that he can alienate to an outsider that which he can claim at partition and is

properly called a share and a recent case shows that the extent that is alienated, when it comes to be divided for the outsider''s benefit, will be that

which would have been divided if partition had occurred at the time of the alienation. That seems to me the decision of the Full Bench in Chinna

Pillay v. Kalimuthu Chetty ILR (1912) M. 47. It is impossible, I think to say that there is nothing which he could alienate to his coparceners,

nothing which they could obtain in exchange for their money. I fail to see why the transaction does not come within the Transfer of Property Act''s

definition of sale as the transfer of ownership in exchange for a price paid or provided or part paid and part ''promised. Now, if it is a sale, then a charge attached to the whole of the property sold to the extent of Rs. 7,000 and, on that, the finding of the Subordinate Judge, which I have

accepted, is that it was known to the plaintiff. Then it is said that there was a "" contract to the contrary"" i. e., the statement in Exhibit H that "" this

money is reserved with you in order that you may execute to me a hypothecation bond for that amount,"" a contract which negatived the charge

created by Section 55 of the Transfer of Property Act. I have had some doubt whether I should not hold that the statement in Exhibit H had the

effect, but, on the whole, I think it does not. It certainly does not necessarily have that effect, it is not necessarily a substitution of this agreement for

the charge and it was nowhere before alleged that there was a contract in lieu of the charge. I think, therefore that we cannot say properly that

there was any such contract in the case. Then the next argument was that, even if that be so, at any rate when once the mortgage, Exhibit II was

taken in substitution of the lien, the lien was gone. But I think the effect of Section 101 of the Transfer of Property Act is that we must hold for the

benefit of the vendor who has a charge upon the property, that charge was not merged in the mortgage, Exhibit II, if it appears to be for the charge

holder''s benefit to keep it alive. Now, it is not suggested that it was not for the second defendant''s benefit to keep the charge alive and, therefore,

unless it is clear that he intended to give it up (and that, I think, is not clear from Exhibit II), I think we ate bound to hold, according to Section 101

of the Transfer of Property Act, that he did keep it alive. That being my opinion, it seems to, follow that the Subordinate Judge''s decree is right, It

was suggested that if that is so then Section 81 of the Transfer of Property Act should be applied. But that applies only in cases where the plaintiff

has no notice of the previous mortgage. It is also suggested that we should apply the provisions of Section 82 of the Transfer of Property Act as to

Contribution, but it appears to me that it is unnecessary to do that in this suit. There is a memorandum of objections and that attacks the finding of

the Subordinate Judge that the plaintiff had notice that only some part of the price was unpaid. It is based on evidence which is intended to show

that there was before the plaintiff''s mortgage a definite agreement known to him that the particular lands of the Kamsapuram village were to be

mortgagd to secure the unpaid price under Exhibit H. The Subordinate Judge thinks that this is not proved and I certainly agree with him in that.

The only witness who speaks definitely to the agreement alleged, is the2nd defendant himself and the question was only asked of him in cross-

examination. His evidence, I think, can hardly be relied upon agreement other that the simple agreement to execute a hypothecation bond. In the

result, I think, the appeal fails and the Memorandum of objections also fails and both must be dismissed with one set of costs in each.

Abdul Rahim, J.

2. I agree.

