
(1925) 02 MAD CK 0056
In the Madras High Court

Kandasami Nayakkar and Others

APPELLANT

Vs

Venkata Reddiar and Others

RESPONDENT

Date of Decision : 24-02-1925

Acts Referred:

Transfer of Property Act, 1882 — Section 74

Citation : AIR 1925 Mad 1219 : (1925) 22 LW 238

Hon'ble Judges : Spencer, J;Ramesam, J

Bench : Full Bench

Judgement

Spencer, J.—The facts of this case appear from my learned brother's judgment, which I have had the benefit of perusing, and from the

judgment of the Court below. The important points to be noted are: first, that the 1st defendant, who was an adult in 1912, when the suit mortgage

(Ex. A) was executed by his father, Akkala Naicker, did not join in executing it, and that therefore he and his minor sons, Defendants 2 and 3,

who are the three appellants before us, are not directly bound by it; secondly, that between the date of the earlier mortgage of 1898, executed by

Akkala Naicker, on behalf of himself and his then minor son, 1st defendant, and the date of the suit mortgage, there was a partition in 1907

between Akkala Naicker and 1st defendant, in which the mortgage of 1898 was allotted to the share of the father, Akkala Naicker, and therefore

Akkala Naicker had no power to encumber the separate estate of 1st defendant, even if he intended to do so, and that he had an intention to do

so is not apparent from his action, in signing only on behalf of himself and 4th defendant, his minor son by a second wife. The only question for our

decision in this appeal, apart from a question of limitation, which it becomes unnecessary to decide, if on this point we find for the appellants, is

whether the plaintiff has any right, through subrogation, to bring the properties of the appellants to sale, on account of part of the consideration of

Ex. A having gone to discharge the debt under Ex. B.

2. Upon this question I think that the Subordinate Judge was mistaken, in following the decision, in *Chidambaram Nadan v. Muni Nagendrayyan*

[1920] 12 L.W. 393, as if the facts of that case were similar to the present. That was a case, where there was an intermediate encumbrance. The

4th mortgagee, having paid off the 1st and 3rd mortgagees, claimed to stand in the shoes of the 1st mortgagee and to have priority over the 2nd

mortgagee. The learned Judges held that because the 4th mortgagee had undertaken in writing to pay off the prior mortgagee with his own money,

there was a presumption, that he intended to keep that encumbrance alive for his own benefit. They refer to certain observations of Srinivasa

Ayyangar, J., in *Muthammal v. Razu Pillai* [1918] 41 Mad. 513, as obiter and say that they were coloured, by a view of the effect of *Mohesh Lal*

v. Mohant Bawan Das [1883] 9 Cal. 961, which they regarded as erroneous. I can only understand this as meaning that they considered Srinivasa

Ayyangar, J.'s view to be erroneous and not that they doubted the correctness of *Mohesh Lal v. Mohant Bawan Das* [1883] 9 Cal. 961, which is

a Privy Council decision. I do not find any essential conflict of principle between *Mohesh Lal v. Mohant Bawan Das* [1883] 9 Cal. 961 and

Gokaldas Gopaldas v. Puranmal Premasukhdas (1884) 10 Cal. 1035, which is also a decision of the Privy Council. The latter was a case where a

purchaser of the equity of redemption, who exercised the owner's right of redeeming his property, from encumbrances paid off the first mortgagee

and then used that prior mortgage, as a shield against the claims of a subsequent mortgagee. When the question arose, whether the party paying off

the charge intended to extinguish it or to keep it alive, their Lordships observed that he must be presumed to have acted according to his interest.

In *Mohesh Lal v. Mohant Bawan Das* [1883] 9 Cal. 961, the plaintiff lent a sum of Rs. 10,641, in cash, which was used by Mangal Das, partly to

pay off a debt to another creditor, named Lakshmi Narain, to whom he had mortgaged not only three villages, belonging to a religious institution,

held by him under a grant from the then Mohant, but also one village of his own purchased by him with money lent by the plaintiff previously. The

question arose whether Mangal Das intended to keep Lakshminarain's mortgage alive. Their Lordships held that Mangal Das had no interest in

keeping Lakshminarain's mortgage alive, and that it was paid off by him and not by the plaintiff. Then they observe:

It must be presumed that, when the plaintiff lent the money to Mangal to pay off the mortgage he lent it upon the security expressed in the bond and

for which he stipulated. Equity cannot give him an additional security because the security relied upon turns out to be bad as regards a portion of

the lands included in it.

3. Similarly, in the present case there is no room for a presumption of an intention on the part of the parties, that Ex. B should be kept alive, after it

was discharged. There was no intermediate encumbrance, against which it might have served as a shield. Before the subsequent mortgage was

executed, the prior mortgage had been discharged and ceased to exist. Section 74 of the Transfer of Property Act gives a subsequent mortgagee a

right to pay off a prior mortgagee, but he cannot by so doing enlarge the scope of the security which he had got by his own mortgage deed, upon

the property of his mortgagors. This section covers independent acts of subsequent mortgagees, paying off prior mortgagees, and has no

application to the facts of this case. For Avudayammal's mortgage was finally discharged on April 12th, 1912, before the plaintiff's mortgage was

executed on April 21st, 1912, as it appears from the endorsement on Ex. B. Section 91 is not applicable because the plaintiff had no interest in

redeeming property other than what was legally the subject of his mortgage. In the words of Sir Barnes Peacock:

There is nothing in the bond, or in the evidence, or even in the surrounding circumstances, to show that the mortgagor (there Mangal, here Akkala

Naicker) intended to keep the mortgage (there Lakshminarain's here Avudayammal's) alive, or that he or the plaintiff intended that the latter

should hold that mortgage as an additional security for the loan.

4. The mortgagor's interest was to extinguish Avudayammal's mortgage, which carried 12 per cent, interest, by giving a mortgage to the plaintiff at

9 per cent, and he therefore cannot be presumed to have intended to agree to its being kept alive.

5. Following *Mohesh Lal v. Mohant Bawan Das* [1883] 9 Cal. 961, I agree with

my learned brother that this appeal must be allowed with costs, in both Courts, and the plaintiff's suit dismissed against Defendants 1 to 3. The decree will be drafted, so as to make the 4th defendant's properties alone liable.

6. Time for payment is extended to 6 months, from this date.

Ramesam, J.

7. The appeal arises, out of a suit brought on a deed of mortgage (Ex. A, dated 21st April 1912), executed by one Akkala Naicker, on his own

behalf, as well as on behalf of his (then) minor son Algirisami Naicken, 4th defendant. The 1st defendant is another son of the said Akkala

Naicken, by a different wife. So, he is a half brother of 4th defendant. 2nd and 3rd defendants are his son. The defendants 1, 2 and 3 were

impleaded; on the ground (among other grounds which need not be considered), that part of the consideration of Ex. A went in discharge of an

earlier mortgagee bond (Ex. B, dated 20th July, 1898), executed by the said Akkala Naicken for himself and as guardian of the 1st defendant. To

the extent it was so utilized, the Subordinate Judge granted a decree against Defendants 1 to 3, who appeal.

8. It is now conceded that the first defendant and Akkala Naicken had been divided, on the date of Ex. A, and a suit by Akkala Naicken, for

reopening the partition, was actually pending on that date. The suit was afterwards dismissed. It is also conceded that properties, which had fallen

to the share of the 1st defendant in the partition, according to the findings in the suit, were included in the document (Ex. A), Prima facie, this

document cannot, by itself, bind the appellants or their properties. But the Subordinate Judge held, following *Chidambaram Nadan v. Muni*

Nagendrayyan [1920] 12 L.W. 393, that the plaintiff could claim the rights of the mortgagee, by subrogation. It may be at once observed that that

decision cannot help the respondent. That was the case of a 4th mortgagee, the consideration being partly the discharge of a third mortgage, which

itself was in consideration of paying a portion of the first mortgage, and partly the discharge of the balance of the first mortgage. It was held that the

4th mortgagee could claim priority over the 2nd mortgagee. I agree with the decision, though not with the remarks in the judgment, which imply

that the decision in *Mohesh Lal v. Mohant Bawan Das* [1883] 9 Cal. 961, is

inconsistent with that in *Gokaldas Gopaldas v. Puranmal Premsukh*

Das (1884) 10 Cal. 1035, that the former presented some difficulty, which has to be got over and that the observations of *Srinivasa Aiyangar, J.*,

in *Muthammal v. Razu Pillai* [1918] 41 Mad. 513, are erroneous. I do not think that the observation in *Muthammal v. Razu Pillai* [1918] 41 Mad.

513, are erroneous though the same are obiter. In my opinion, the two decisions in *Mohesh Lal v. Mohant Bawan Das* [1883] 9 Cal. 961 and

Gokaldas Gopaldas v. Puranmal Premsukh Das (1884) 10 Cal. 1035, are not inconsistent and represent two types of cases. In *Mohesh Lal v.*

Mohant Bawan Das [1883] 9 Cal. 961, there was no intermediate incumbrance; whereas there was one, in *Gokaldas Gopaldas v. Puranmal*

Premasukh Das (1884) 10 Cal. 1035. The latter governed the facts of *Chidambaram Nadan v. Muni Nagendrayyan* [1920] 12 L.W. 393, and was

rightly applied; but, there was no need to explain the decision in *Mohesh Lal v. Mohant Bawan Das* [1883] 9 Cal. 961, as it could not present any

difficulty, in the disposal of the case. On the other hand, the decision in *Koopmia Sahib v. Chidambaram Chetti* (1896) 19 Mad. 105 and

Chellamcherla Kalagayya alias Sundaramayya Vs. Mummareddi Yanadamma (died) and Others, , follow and apply to in similar facts, *Mohesh Lal*

v. Mohant Bawan Das [1883] 9 Cal. 961. On a close examination of the facts of the last case, I find it difficult to distinguish it from the facts before

us. The first mortgage, effected by *Mangal Das*, on 2nd July 1869, (in that case), corresponds to Ex. B and the suit mortgage in it corresponds to

Ex. A. The appellants before us stand, on the same footing as *Bawan Das*, the Mohant of the Asthal of *Jankingar*. The same parcels of property (3

of them belonging to the Asthal and one belonging to *Mangal Das*) were mortgaged under this. The first mortgage was assumed to be binding on

the Asthal; but it was held that the 2nd was not, as *Mangal Das* ceased to be the agent. *Mr. Ramachandra Aiyar*, who appeared for the plaintiff,

relied on the decision, in *Mollaya Padayachi v. Krishnaswami Iyer* AIR 1925 Mad. 95. Though the learned Judges in that case, agreed in the

conclusion, they gave differing reasons. The reasons of *Kumara-swami Sastriyar, J.*, are not applicable to the present case. *Spencer, J.*, relied on

Narayana Kutti Goundan v. Pechiammal (1913) 36 Mad. 426 and *Bhagwan Singh v. Mazhar Ali Khan* (1914) 36 All. 272 and held that the

plaintiff was interested in paying the amount. The case in Narayana Kutti Goundan v. Pechiammal (1913) 36 Mad. 426, was the case of a

reversioner and as was pointed out by me in Narayanaswami v. Periasami Odayar AIR 1921 Mad. 272, a reversioner may, in certain

circumstances, be entitled to redeem, even during the life time of the widow. The report at page 959 erroneously refers to Vengamma v.

Chelamayya (1913) 36 Mad. 484, instead of the case in Narayana Kutti Goundan v. Pechiammal (1913) 36 Mad. 426. The case in Bhagwan

Singh v. Mazhar Ali Khan (1914) 36 All. 272 is the case of a co-mortgagor. Neither of these cases nor the decision in Mollaya Padayacki v.

krishnaswami Iyer AIR 1925 Mad. 95, are helpful to me, in deciding the present case. Mr. Ramachamini Iyer also relies on Dinobundhu Shaw

Chowdhry v. Jogmaya Dasi (1902) 29 Cal. 154 and Ammani Ammal Vs. Ramasawmi Naidu and Others, . But these cases are distinguishable. In

the former, the second mortgage became futile, even against the mortgagor, as it was effected, during the pendency of an attachment and it was

held that the first mortgage was intended to be kept alive. But in the case before us, Ex. A, remains perfectly valid against Akkala Naicken and 4th

defendant and their properties and the plaintiff wishes to add to the security, by claiming a charge even against the appellants' properties, wrongly

included in Ex. A. I, at first, thought that Ex. A being a valid mortgage of Akkala Naicken's properties (common to Exs. A and B), as regards the

consideration, other than that which was utilised in the payment of Ex. B, the plaintiff might be regarded as 2nd mortgagee of Akkala Naicken's

properties and could thus redeem Ex. B, (Section 74 of the Transfer of Property Act) and thus subrogate himself to the rights of the mortgage

under Ex. B and thus indirectly could claim a charge, even against such of the properties of the 1st defendant, which were common to Exs. A and

B. But the game might be said, on the facts of Mohesh Lal v. Mohant Bawan Das [1883] 9 Cal. 961 and as the Judicial Committee refused any

relief, against Bawan Das, by splitting up the suit bond into two parts, I do not think this line of reasoning is permissible. See Chellamcherla

Kalagayya alias Sundaramayya Vs. Mummareddi Yanadamma (died) and Others, and Govindasami Tevan v. Dorasami Pillai (1911) 34 Mad.

119.

9. If the plaintiff, after finding he was misled by Akkala Naicken, in dealing with the properties of 1st defendant, abstained from the payment of the amount due on Ex. B, as provided for, in Ex. A and informed Akkala Naicken of the same, he might then possibly become a 2nd mortgagee of Akkala Naicken's properties only. Whether he would then be entitled to redeem Ex. B, by reason of his position as such 2nd mortgagee, need not be discussed, as it is not suggested in the present case, that the payment of the amount due on Ex. B was paid otherwise than in pursuance of the terms of the deed (Ex. A). We are bound to follow *Mohesh Lal v. Mohant Bawan Das* [1883] 9 Cal. 961. It is not suggested that there are any other facts from which an intention to keep Exhibit B alive can be inferred. The primary object of Ex. A was to pay off Ex. B.

10. In the view I take of this point, it is unnecessary to consider the question of limitation. The result is that the appeal must be allowed and the plaintiff's suit will be dismissed with costs throughout, so far as the defendants 1 to 3 are concerned. The decree against 4th defendant will stand.

A fresh mortgage decree will be drawn up, against the properties of the 4th defendant only. The time for payment is extended to 24th August 1925.