
(1924) 08 MAD CK 0052
In the Madras High Court

Kandaswami Chetti

APPELLANT

Vs

Adimoola Chetti (dead) and Another

RESPONDENT

Date of Decision : 29-08-1924

Acts Referred:

Transfer of Property Act, 1882 — Section 73

Citation : AIR 1925 Mad 275 : 85 Ind. Cas. 277 : (1924) 47 MLJ 704

Hon'ble Judges : Devadoss, J

Bench : Division Bench

Judgement

Devadoss, J.—The plaintiff in this case attached before judgment two bulls belonging to his judgment-debtor, Veera Pillai. The defendants

put in a claim petition that they had a hypothecation right over the bulls and their claim petition was allowed in their favour. The plaintiff has brought

the suit for a declaration that he is entitled to execute the decree obtained by him against Veera Pillai and that the bulls are not subject to any

charge in favour of the defendants. Both the lower Courts have held that the hypothecation of the bulls in favour of the defendants prevailed over

the right of the plaintiff to attach the bulls and dismissed his suit. The judgment-debtor had two bulls which he hypothecated to the defendants. He

sold these bulls in a shandy for Rs. 115 and purchased, four or five days after, the bulls in question for Rs. 125. Mr. Rajah Iyer on behalf of the

appellant contends that the hypothecation right of the defendants does not attach to the bulls purchased by the judgment-debtor with the sale

proceeds of the bulls hypothecated. That the hypothecation of chattels is valid is now well settled by Sreeram Narasiah Vs. Bommireddi

Venkataramiah, . In the case of a mortgage of Immovable property the mortgage right attaches to the property which is substituted for the

mortgaged property. In Venkatarama Iyer v. Esumsa Rowthen ILR (1909) M 429 : 20 MLJ 330 it was held that the mortgagee was entitled to a charge on the property which through no fault of his had taken the place of the mortgaged property. Krishnaswami Iyer, J., who delivered the leading judgment in the case, relied upon the principle contained in Section 73 of the Transfer of Property Act and held that the mortgagee is entitled to a charge on the property which has taken the place, in substitution, of the property actually mortgaged. At page 434 he observed "" It is well known that the money or the property given by Government in substitution for the lands taken up under the Land Acquisition Act is charged in favour of the mortgagee who had his claim upon the property so taken."" When properties are acquired under Land Acquisition Act by the Government and some other property is given in substitution the charge in favour of the mortgagee attaches to the property so substituted. But in order that the charge may attach to the newly acquired property it must be clear from the evidence that the newly acquired property was the property sought to be substituted for the property actually mortgaged. Otherwise the mortgage charge on the mortgaged land would not attach to the property newly acquired. In Nidhi Lal v. Mazhar Hussain ILR (1885) A 436 the facts were : N was in possession of six shops in a marketplace, two as mortgagee and the other four as proprietor. The Municipal Committee of that place decided to establish the market in a fresh place, and to use the site of the old market for other purposes, and arranged with N to take the sites of his six shops in the old market-place and gave him in lieu of them sites for six shops in the new. Under this arrangement he built six shops in the new market-place. Subsequently, the mortgagor of one of the old shops claimed possession of one of the six new ones on payment of the mortgage money and cost of constructing the shop. The Court held that the claim could not be allowed, inasmuch as it could be justified only by a proof of an agreement binding upon the parties at the time when the transaction occurred, that some specific one among the new shops should be substituted for the old one which was the subject of the mortgage, and it had not been found that any such agreement was made. As observed by the learned Chief Justice, "" The plaintiff's claim was a mere vague attempt by the mortgagor to get hold of some shop or other without knowing or caring which one out of the six it is to be.

2. The question before me is whether this right of the mortgagee to proceed against the substituted property as being subject of his charge does

apply to the case of hypothecation of chattels. In the case of hypothecation of chattels possession is not given to the hypothecatee. If possession is

given to the hypothecatee the transaction would become a pledge. In the present case the old bulls which were hypothecated to the defendants

were sold by the hypothecator, and he purchased two new bulls, four or five days after the sale of the old bulls, for Rs. 125. The contention of the

respondent is that the new bulls having been purchased with the sale proceeds of the old bulls the right of the hypothecatee must extend to the new

bulls. A good title can be acquired by a bona fide purchaser of bulls without knowledge of the hypothecation that is very clear from Sreeram

Narasiah Vs. Bommireddi Venkataramiah, where it is held that the lien of the hypothecatee does not attach to goods sold to a bona fide purchaser.

Chidambara v. Muthaya ILR (1882) M 330 is against the contention of the respondent. In that case M pledged his ship to C as security for a

bond debt of Rs. 1,500, repayable by two instalments. S seized the ship in French territory for a debt due by M and the French Court sold the

ship. C made a claim on the proceeds of the sale in the hands of the Court The Court held that "" whether or not his lien was destroyed by the sale

of the ship in French territory, C was not entitled to any of the proceeds of the sale either at the date of the sale or of his claim in the French Court.

The learned Judges observe at page 333 : "" Plaintiff had no right whatever in the sale proceeds of the ship at the, date of the sale or at the date of

the claim made by him which defendant resisted. Those proceeds, in so far as they were more than available for defendant's claim, belong to the

Manjirasa. All that plaintiff could claim of Manjirasa was payment at the due date which had not arrived. He could not say of anything belonging to

Manjirasa, save what had been pledged to him, that he was entitled to it, or had acquired any right to it. "" They also held that the mere fact of the

proceeds being in French could not make any difference as to the principle of their decision.

3. It is clear from these decisions that the mortgagee's right does not attach to the sale proceeds of the property hypothecated.

4. Mr. Venkatrama Aiyar, who appears for the respondents, contends that the hypothecatee is entitled to pursue his remedy against the property in

whatever form it may exist, in other words, he has got the right to go against the proceeds in the hands of the hypothecator. His argument is that if

the pledged property is converted into some other property the hypothecatee is entitled to have his charge on the property so converted; and he

relies upon two cases, *Taylor v. Plumer* (1815) 3 M & S 562 : 105 E R 721 and *Sinclair v. Brougham* (1914) AC 398. The case of *Taylor v.*

Plumer (1815) 3 M & S 562 : 105 E R 721 was one of trust. There was a fiduciary relationship between the parties and the factor or the agent

converted the goods in his possession into money and security, and the Court held that the principal was entitled to proceed against such security

which was purchased with the proceeds of the principal's goods in the hands of the agent. If it is a case of trust, the trust property can be pursued

in the hands of strangers. In the present case there was no trust at all. The judgment-debtor was only a hypothecator and the defendants were only

hypothecatees; and therefore the case of *Taylor v. Plumer* (1815) 3 M & S 562 : 105 E R 721 has no application to the present case.

5. In *Sinclair v. Brougham* (1914) AC 398 Viscount Haldane in the course of his judgment observed with regard to *Taylor v. Plumer* (1815) 3 M

& S 562 : 105 E R 721:--""Lord Ellenborough laid down, as a limit to this proposition, that if the money had become incapable of being traced, as,

for instance, when it had been paid into the broker's general account with his banker, the principal had no remedy excepting to prove as a creditor

for money had and received. The explanation was, of course, that a relation of debtor and creditor had arisen between the banker and his client the

broker, which precluded the notion of following the money. "" Mr. Venkatrama Aiyar wanted to rely upon the observations of Viscount Haldane at

page 420 wherein he said :--"" It is, in my opinion, impossible to confine the right at law to follow to cases where there was a fiduciary relationship.

He wanted to apply that dictum as governing the present case. But at page 419 Viscount Haldane quoted Bramwell, L.J.'s observations in *Ex*

parte Cooke (1876) 4 Ch D 123 which explain the principle of *Taylor v. Plumer* (1815) 3 M & S 562 : 105 E R 721 :--""Because the money was

paid to the broker, not as a trustee in the strict sense of the word, so that no action at law could be maintained against him, and he would only be

liable to have a bill filed against him, but was handed to him in fiduciary character, so as not to create the mere relation of debtor and creditor

between him and his principal. "" Thesiger, L.J. observed in *Re Hallett's Estate* 13 Ch D 696, ""All cases where it has been held that moneys mixed

and confounded, but still existing in a mass, cannot be followed, may, I think, be resolved into cases where, although there may have been a trust

with reference to the disposition of the particular chattel which those moneys subsequently represented, there was no trust, no duty in reference to

the moneys themselves beyond the ordinary duty of a man to pay his debts; in other words, that they were cases where the relationship of debtor

and creditor had been constituted, instead of the relation either of trustee, and cestui que trust, or principal and agent.

6. In this case sale was four or five days before the purchase of new bulls. Since the bulls hypothecated were sold the hypothecatee could proceed

against the hypothecator only as a debtor, for the sale gave purchaser a good title and the hypothecatee could not proceed against the bulls in the

hands of the bona fide purchaser. If the purchaser had notice, no doubt, the hypothecatee could proceed against the bulls, for the purchaser

purchased with the knowledge that there was a charge in favour of the hypothecatee against the bulls. But supposing the bulls were sold to a

purchaser with such notice can the hypothecatee proceed against the bulls purchased with the sale proceeds of the old bulls? Mr. Venkatrama

Aiyar answers "" he has right of election. "" I do not see how the right of election comes in; for they were sold to the purchaser with notice of the

hypothecation right in which case he cannot proceed against the bulls as well as against the sale proceeds in the hands of the hypothecator. And if

the sale was to a person without notice of the hypothecation right the buyer acquires a good title and the hypothecatee can only look to the

hypothecator for payment of his money; in other words, the relationship of debtor and creditor arises the moment the bulls are sold to a person

without notice. In this case the bulls were sold four or five days before the new bulls were purchased. I do not think the right of hypothecatee of

chattels attaches to goods or chattels purchased with the sale proceeds of chattels or goods mortgaged. No doubt the case would be different if

there was a contract that the hypothecatee should have a right against the goods substituted for the goods actually sold. In the case of

hypothecation of stock-in-trade of a going concern there is always a term in the deed of hypothecation, or there is a contract, that the

hypothecatee should have charge on the goods which are purchased to replace the place of goods sold. No such contract has been proved in this

case. Therefore, I have no hesitation in holding that the right of the defendants as hypothecatees does not attach to the bulls purchased by the

judgment-debtor partly with the sale proceeds of the bulls hypothecated.

7. In the result, the appeal is allowed, and the judgments of the lower Courts are reversed, and the plaintiff will have a decree.

8. Both the defendants will pay plaintiff's costs.

9. The first respondent having been given up the proper order would be the 2nd defendant who is the 2nd respondent here will pay the costs of

this second appeal, and the costs in the lower Courts will be paid by the 2nd defendant and the legal representatives of the 1st defendant.