

(1939) 10 MAD CK 0024
In the Madras High Court

Katragada Lakshminarasamma

APPELLANT

Vs

Singamsetti Venkatasatyanarayana Rao

RESPONDENT

Date of Decision : 10-10-1939

Acts Referred:

Citation : AIR 1940 Mad 571 : (1940) 51 LW 517 : (1940) 1 MLJ 664

Hon'ble Judges : Patanjali Sastri, J

Bench : Division Bench

Judgement

Patanjali Sastri, J.—The only question arising for decision in this appeal is whether a mortgage executed after the passing of the Madras

Estates Land Act can be regarded as an "encumbrance created before the passing of the Act" within the meaning of Section 125 thereof by reason

of the fact that the mortgagee paid off a mortgage executed before the Act and thereby became entitled to be subrogated to it.

2. The facts, so far as they are material for the determination of this question, may be briefly stated. The appellant purchased the property which is

a ryoti holding in an estate from one Subba Rao who had purchased it in October, 1926, at a rent sale held at the instance of the land-holder for

recovery of arrears of rent due from the registered owner of the land. Long before the rent sale, however, the property had been mortgaged by the

owner to one Prabhakaramurtamma under a mortgage (Ex. I) dated the 5th November, 1910. The deed provided that the mortgagee should, out

of the mortgage money, pay off on earlier mortgage Ex. IX of 1904 on the same; property and that the security should be kept alive for the benefit

of the mortgagee. A decree having been obtained on the mortgage in O.S. No. 19 of 1923 of the District Court, Kistna, the property was brought

to sale in execution and the respondent in this appeal purchased it in court auction. ""The appellant on the strength of the title acquired under the rent sale obstructed the respondent when the latter attempted to take delivery of the property in pursuance of his purchase at the execution sale but the obstruction was removed by a summary order of Court in E.A. No. 1 of 1931 filed in that mortgage suit. He thereupon brought the present suit to set aside that summary order and establish his right to the property against the respondent.

3. The Court below has dismissed the suit on the ground that the rent sale at which the appellant's predecessor-in-title purchased the property

passed no title to the purchaser as it had been already sold at an earlier rent sale held in 1925. But as the learned Subordinate Judge himself held

that the earlier sale was void as the pattadar was dead when the notice of such sale was served by affixture to his house, there was no reason why

the second sale which, according to him, was held in due compliance with all the formalities prescribed by the Act, should not operate to pass title

to the purchaser. The respondent's counsel rightly admitted that the decision of the learned Subordinate Judge could not be supported on that

ground. He attempted however to support the decree appealed against by contending that the appellant's title derived through the rent sale

referred to above could not prevail against the respondent's purchase at the Court sale in execution of the mortgage decree, having regard to the

provisions of Section 125 of the Act. That section, so far as it is material here, provides that when a holding or part of a holding is sold for arrears

due in respect thereof, the purchaser shall take subject to ""any encumbrances created before the passing of the Act"". The saving of encumbrances

existing at the date of the Act is, of course, clue to the fact that under the earliest Rent Recovery Act, rent was not a first charge on the holding,

whereas u/s 5 of the present Act, it is made a first charge, with the result that encumbrances created after this Act came into force are subordinated

to the landholder's claim for rent. Prima facie, the mortgage Ex. I to which the respondent traces his title having been executed in 1910, it seems

impossible to regard it as an encumbrance created before the passing of the Act in 1908. But the respondent's counsel contended that, the

mortgage deed having expressly provided for the discharge of the earlier mortgage under Ex. IX of the year 1904 and for the keeping alive of that

security, the mortgage Ex. I, must be deemed to be an encumbrance created before the passing of the Act within the meaning of Section 125. In

support of this contention, reliance was placed on Sreekanta Sundararamiah and Others Vs. Tadikamalla Venkatasubbiah and Others, . But it is to

be noted that both these decisions relate to a case where the later mortgage executed after the Act was taken by the same person who held the

earlier mortgage which was thus merely renewed under the later deed and the Court applied the principle:

that a man by taking a further security for his money that is charged upon land, does not, and cannot be taken thereby to have intended to, give up

his rights under the earlier deed which he had

and held that though the suit was brought on the later mortgage, it must be regarded as having been based equally upon the earlier mortgage which

had been created before the passing of the Act. But the principle cannot be invoked by the respondent here as he cannot in any sense be regarded

as having held any mortgage created prior to the Act, as Ex. IX had been executed to a third party. The respondent might be entitled to be

subrogated to the rights of the mortgagee under Ex. IX in a question with an intermediate mesne encumbrancer, if any, but it would, in my opinion,

be stretching the language of Section 125 far too much to hold that by reason of such a right of subrogation arising out of it, the mortgage under Ex.

I must be deemed to be an encumbrance ""created before the passing of the Act"" although in fact it was executed subsequent to the Act. The

distinction, for purposes of Section 125, between a mortgage taken merely in renewal of an earlier one in favour of the same person and a

mortgage taken by a person who pays off a prior encumbrance and becomes thereby entitled to a right of subrogation was recognised in

Sreekanta Sundararamiah v. Venkatasubbiah (1924) 46 M.L.J. 380, the learned Judge expressing the opinion that the principle of that decision

might not apply to a person who merely claims a right of subrogation.

4. I hold, therefore, that the rent sale under which the appellant claims title operated to vest the property in the purchaser free from the mortgage

under Ex. I and prevails against the title acquired by the respondent by his purchase at the Court sale in execution of the decree obtained on that

mortgage.

5. The appeal succeeds and the appellant's suit is decreed so far as it relates to the property covered by the second rent sale held on 19th

October, 1926. The parties will pay and receive proportionate costs throughout.

6. Leave granted.