

(1916) 08 MAD CK 0070
In the Madras High Court

Kunchithapatham Pillai and Others and Doraisami Pillai and Another APPELLANT

Vs

Palamalai Pillai and Others RESPONDENT

Date of Decision : 29-08-1916

Acts Referred:

Citation : 39 Ind. Cas. 405

Hon'ble Judges : Seshagiri Aiyar, J; Napier, J

Bench : Division Bench

Judgement

1. The owner of the properties was one Murugappa Pillai. He mortgaged them to one Krishnachariar in 1895. In September 1897 he sold some of the properties comprised in the mortgage to one Kunjithapatham with a direction to pay Krishnachariar, the mortgagee, Rs. 1,200. A portion of this amount was paid, but a good portion remained unpaid. In October some other properties, also included in the mortgage, were sold to one Duraiswami, with a direction to pay Rs. 460 and odd to the mortgagee, the deed also containing a covenant to clear off prior mortgages. This was not paid. The remaining properties comprised in the mortgage were sold to Rajagopal and others and they were asked to pay the mortgagee Rs. 2,000 and odd. This sale-deed is not before us on appeal, but it is admitted that there is no assignment or specific covenant in favour of the purchaser on which he can rely for the purpose of this suit. The mortgagee sued Murugappa Pillai and the three alienees among others on the mortgage. Kunjithapatham and Duraiswami entered into a compromise with the plaintiff regarding the amounts payable by them. Rajagopal (we shall call the third party by this name, although there are others who have equal interest with him) was no party to this compromise. The decree in the suit was for Rs. 8,000 and odd, and it directed that out of the said amount Duraiswami should pay Rs. 500, Kunjithapatham Rs. 1,000, that in default their properties should be sold for the amounts specified, and that for the balance the other properties which were in the possession of Rajagopal and others should be sold. Rajagopal had to pay a considerable sum, as he was the largest purchaser. This suit is by his heirs for

contribution. It was found by the District Munsif, and not disputed before us, that both Duraiswami and Kunjithapatham paid under the decree the portion of the debt which would have been chargeable on the properties purchased by them, if there were no directions to them to pay particular sums. The plaintiffs base their suit on the allegation that as both Duraiswami and Kunjithapatham undertook to discharge a specific portion of the mortgage-debt, and as their failure to pay the amount within the time mentioned by the mortgagor increased the amount due to the mortgagee, their liability should not be calculated upon the value of the properties purchased by them, but upon the quantum of the liability undertaken by them at the direction of the mortgagor. The District Munsif dismissed the suit. On appeal, the District Judge, relying on Sections 69 and 70 of the Indian Contract Act, decreed the claim. Duraiswami and Kunjithapatham have preferred separate appeals to this Court.

2. The question has been argued with great ability before us, and the arguments covered a very wide ground of the law of mortgages. We think the solution has to be found in the Transfer of Property Act and not in the English cases quoted at the Bar.

3. The liability to rateable contribution of properties mortgaged in the first instance and sold subsequently in lots to different persons is imposed by the Transfer of Property Act. The legislation may have been based on equitable grounds; but its limits are prescribed by the Statute. In the second clause of Section 82, the liability is defined in a particular way, "in the absence of a contract to the contrary." Now, "this contract to the contrary" can only be between the parties who are liable to contribute. That is the plain meaning of the section. See also observations in *Ramabhadrachar v. Srinivasa Ayyarsgar* 24 M.K 85. Mr. Venkatarama Sastriar in his very able argument referred us to certain English decisions to the effect that a contract as between the mortgagor and the purchaser of a portion of the property is within the meaning of the expression contract to the contrary." We are unable to accept this contention. We shall have a word to say about the English authorities later on; but before doing so, we shall deal with the section of the Act.

4. u/s 55, Clause 4(b), the Vendor has a lien for the unpaid mortgage-money over the properties sold. This lien, it was held in a recent Full Bench ruling of this Court *Sivasubramania Aiyar v. Subramania Aiyar* 37 Ind. Cas. 429 ; (1916) 2 M.W.N. 306, is not lost by the direction given by the vendor to pay the mortgagee or any other third party. This right can be transferred, if the vendor executes a proper conveyance in this behalf. But until such a transfer is made, the right inheres in the vendor and in him alone. A subsequent purchaser from him cannot acquire this right by the mere fact of his purchase. The Transfer of Property Act has prescribed the mode by which such transfers can be effected, and in our opinion, there is no room for the applicability of equitable considerations when the Legislature has enacted specific rules.

5. Mr. Venkatarama Sastriar's contention, if accepted, must lead us to hold that

when the vendor sells a portion of the property with direction to pay a portion of the mortgage-debt, the mortgage-debt to that extent is extinguished. This would violate the principle that it is open to the mortgagee to sell any portion of the mortgaged property to recover the amount due to him. The learned Vakil argued that when the owner directed the purchaser to pay a certain amount, he impliedly transferred his right of lien to the second purchaser. There are some decisions which lend support to this contention. In *Bute (Marquis of v. Cunynghame)* (1826) 2 Ru Se 275 Lord Eldon said: But may not a man make a mortgage of two estates in such a way, that, though the incumbrances may go against both or either, yet, if the owner of the equity of redemption shall have created, in the meantime, two different titles to those estates, so that they shall go to different persons, the estate, which was the primary security, shall remain the primary security, as between the persons claiming under that mortgagor?" This is the passage very strongly relied on; but towards the close of the judgment, the Lord Chancellor said: "Taking the whole of this transaction together and without venturing to lay down any general principle, it is my opinion that, in this case, there is no right to that contribution towards satisfaction of the mortgage, which is prayed by the bill." This was a case of voluntary settlement, and the question was whether persons claiming under the settlement were not bound by the directions of the settlor. No question of legal rights to contribution arose in the case. That this case enunciated no general principle is pointed out by Jessel, M.R., in *Leoninov Leonino* (1879) 10 Ch. D. 460. Chitty, J., in *In re Dunlop, Dunlop v. Dunlop* (1882) 21 Ch. D. 583 stated: "The proposition has been stated (and I think not incorrectly) that the right of contribution arises where there are two properties available in equity for the debt, of course, in equal degree. It is quite clear that either by special agreement to be found in the instrument creating the mortgage itself, or by declaration on the part of the testator, he can, where two or more properties are comprised in the same security, direct the order in which the securities are to be applied inter se so as to make one the first and another the second, and so forth, available for the purposes of the charge." There can be no doubt that the special agreement referred to by the learned Judge is one which binds the mortgagee and is embodied in the deed of mortgage. The reference to the declaration of the testator indicates that a volunteer must accept the gift with the obligations annexed to it. We do not think these cases support the proposition that by the mere fact of the subsequent purchase, the purchaser gets an implied transfer of the undertaking given to the vendor by the first purchaser. On the other hand, in *Fisher on Mortgages*, paragraph 1347, the law is stated as we find it in the Transfer of Property Act.

6. Turning to the Indian cases relied on in the argument, *Mothooranath Chuttopadhyaya v. Kristokumar Ghose* 2 Ind. Dec. 234 is against the position contended for by the respondent. That case was before the Transfer of Property Act. Dr. Rash Behary Ghose doubts the correctness of the decision, presumably on the dictum of Lord Eldon in *Bute (Marquis of) v. Cunynghame* (1826) 2 Ru

Sec 275. The decision in *Shah Muhammad Abbas v. Muhammad Hamid* 14 Ind. Cas. 179 is under the Transfer of Property Act. The learned Judges correctly (if we may say so with respect) lay down that the contract between the vendor and one of the purchasers would not amount to a contract to the contrary u/s 82; but they proceed to say: "If the defendants are entitled to resist the claim for rateable contribution, it must be on equitable grounds or because the benefit of the agreement has been assigned to them." We agree that if the benefit of the agreement was expressly assigned in a form which the law requires, a valid defence may be raised. But we are unable to accede to the introduction of equitable grounds on a question settled by the Legislature. If there is no contract to the contrary, the provisions of the law must be given effect to.

7. So far we have been dealing with a question on which there is no authority in the decisions of this Court. Mr. Venkatarama Sastriar's second contention involves an examination of two decisions of this Court. The contention is that notwithstanding Section 82 of the Transfer of Property Act, the liability has to be ascertained with reference to Sections 69 and 70 of the Indian Contract Act. Very recently, the Chief Justice and Srinivasa Iyengar, J., held that these sections of the Contract Act do not affect the claim, for contribution u/s 82 of the Transfer of Property Act. *Venkata Simhadri Jagapatiraju v. Sri Lakshmi Nrusimha Roopa* 31 Ind. Cas. 255. We agree with that conclusion. In *Mutjiurakku Mamagan v. Rahkappa Maniagan* 22 Ind. Cas. 9 ; (1913) M.W.N. 1047 Mr. Justice Sadasiva Aiyar rested the claim for contribution on sections 69 and 70 of the Contract Act. Mr. Justice Miller who took part in the decision based his conclusions on other grounds. It may be pointed out that no argument seems to have been addressed to Mr. Justice Sadasiva Aiyar on Section 82 of the Transfer of Property Act. Further, in the case before the learned Judge, apart from the Transfer of Property Act, there was some ground for saying that one man paid what the other was bound to pay. To our mind, the obvious inapplicability of the Contract Act section arises from the consideration that the plaintiff in this case cannot be said to have paid anything which the other was bound by law to pay," as what is intended is a contractual obligation, and not a legal one. It is argued that a person is bound by law to pay, his contractual debts; and in one sense this is true; but we are inclined to think that that it is not what was intended by the section. The illustration seems to indicate the class of liability covered by the section; and it has been very recently held by the Privy Council in an appeal from the decision of the Supreme Court of the Straits Settlements in construing Section 32, Clause 5, of the Evidence Act that the illustrations to a section are a guide to the intent of the Legislature. It is on this ground that the decisions of this Court, which refused relief to a man in whose name a pattah stands and who has been compelled to pay the revenue which the person in enjoyment ought to have paid, rest. See *Boja Sellappa Reddy v. Vridhachala Reddy* 16 M.L.J. 569. One other distinction between the present case and that decided by Sadasiva Aiyar, J., may be pointed out. In the latter there was a personal liability under the decree. We, therefore, see no reason for resorting to Sections 69 and 70 of the Contract Act

Even if the application of Section 69 is not limited as we suggest, it could not, in our view, assist the respondent, because all the assignors of the mortgaged property are equally bound to pay the mortgage-debt and we cannot agree with the contention that any equities between coobligors would make any one of them the less "bound by law to pay" the mortgagee.

8. Mr. Ramachandra Iyer rested his case, also, on the decision in *Satpa Kripal Bandopadhyaya v. Gopi Kishore Mandul* 6 C.W.N. 583 and contended that whatever may have been the rights under the purchase, the decree worked a merger of those rights; and that parties claiming rights under that decree are not bound by previous obligations. In the case relied on, the auction-purchaser was held disentitled to fall back on rights which existed before the decree. We do not think the position of the plaintiffs is analogous to that of an auction-purchaser.

9. In the view we take, and on the finding of the District Munsif not impeached in this Court that the appellants paid the amount proportionate to the value of the properties in their possession, the appeals must be allowed and the suits as against them must be dismissed with costs in all the Courts.