

(1929) 08 MAD CK 0013
In the Madras High Court

Lakshumi Achi and Another

APPELLANT

Vs

Narayanaswami Naicker and Others

RESPONDENT

Date of Decision : 02-08-1929

Acts Referred:

Citation : (1930) ILR (Mad) 188 : (1929) 30 LW 799 : (1929) 57 MLJ 746

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

Bench : Full Bench

Judgement

Ramesam, J.—The suit out of which this appeal arises was filed on the basis of a mortgage bond, dated the 5th March, 1914, executed by

the 1st defendant in favour of one Subramaniam Chettiar, who was the son of the 1st plaintiff and the husband of the 2nd plaintiff. At the time of

the mortgage the 1st defendant had a brother Natarajulu and they were undivided. The plaintiffs claim that the 1st defendant Narayanaswami was

the manager of the family and the mortgage deed was executed for purposes binding on the family. The defendants denied these allegations and

contended that the debt is not binding on Natarajulu's share. This point was found by the Subordinate Judge against the plaintiffs and the plaintiffs.

who are the appellants before us do not attack this finding so far as the state of things existing at the date of the mortgage is concerned. A few

months after the execution of Ex. A, a suit was filed by Natarajulu for specific performance of an agreement to sell Narayanaswami's share of the

family properties with certain other reliefs which it is unnecessary to mention. Ex. C (1), dated the 2nd November, 1914, is the plaint and Ex. C is

the compromise decree passed in that suit, dated, the 23rd November, 1915. According to the said compromise decree, two of the items included

in that suit were settled upon the 1st defendant's wife for life and all the other properties were to be sold to Natarajulu. In execution of this decree, a sale-deed was obtained by Natarajulu through the Court. This is Ex. C (2), dated the 30th November, 1916. The consideration for the sale-deed was Rs. 35,000 and the consideration was to be paid by the vendee undertaking to discharge various, debts of the vendor. Sixteen debts were enumerated in the sale-deed. It is necessary to make particular mention of some of these items. The first item is Narayanaswami's half share of the debt due on a mortgage bond, dated the 11th August, 1909 executed by both the brothers (Ex. V). The fourth item is a sum of Rs. 356-4-0 due wholly by Narayanaswami on a mortgage bond, dated the 10th March, 1913 (Ex. XVI). The fifth item is a sum of Rs. 821-4-0 due wholly by Narayanaswami on a mortgage bond executed by him on the 18th November, 1913 (Ex. XVI-a). The sixth item is a sum of Rs. 1,100 due wholly by Narayanaswami on a mortgage bond executed by him on 1st November, 1913 (Ex. XIV). The tenth item is a sum of Rs. 2,675 due wholly by Narayanaswami in respect of Ex. A. It is unnecessary to refer to the other items. The plaintiffs now claim that Natarajulu's share of the properties also is liable to their debt first on the ground that after the death of Natarajulu in 1919, these properties survived to Narayanaswami and the mortgage, Ex. A, is at least now binding on the whole of the properties and secondly on the ground that Natarajulu having undertaken to pay off Narayanaswami's debts by the sale-deed, Ex. C (2), it has become a personal obligation and he is liable to pay off the debts due to the plaintiffs out of the properties of the family and not merely Narayanaswami's properties. This is the first point argued in appeal, the point having been decided by the Subordinate Judge against the plaintiffs. The second point argued by the appellants is that certain alienees from Natarajulu or his mother, the 2nd defendant, are not entitled to priority over the plaintiffs' mortgage on account of their having paid off certain mortgages of the 1st defendant earlier in date than the plaintiffs' mortgage. The last point argued in appeal relates to the rate of interest. The 2nd defendant, the mother of the two brothers, claims to be interested in Natarajulu's half share of the properties not sold to the alienees.

2. Taking up the first point, one subordinate question that arises is whether after the sale-deed, Ex. C(2), the two brothers should be considered as

divided or still undivided. Mr. Varadachariar, the learned Advocate for the appellants, relied on certain observations of Bhashyam Aiyangar, J., in

Aiyyagari Venkataramayya v. Aiyyagari Ramayya I.L.R.(1902) M. 690 (F.B.) The alienation in that case was by a member of a joint family in

favour of a stranger and the point referred to the Full Bench was what fraction of the family property passed to the alienee by the sale-deed. The

observation relied on is at page 717. I do not think this observation helps the appellants. If a member of an undivided family sells the whole of his

share in some of the family properties or part of his share in such properties but not in other properties, it may be that he continues undivided with

the other members in respect of the properties other than those in which the whole or part of his share has been transferred and this is all that the

observation at page 717 amounts to. It almost implies that so far as the properties in which the whole or part of the member's share is sold are

concerned, he must be regarded as divided from the other members. But where the sale is not to a stranger but to the remaining members of the

family the matter becomes much stronger. The observations at page 268 of Sir Venkataswetha Chalapathy Ranga Rao Bahadur and K.C.I.E.

Maharaja of Bobbili and Others Vs. W.S. Venkataramanjulu Naidu and Others, do not go beyond what I have stated above and even if there are

any observations in those two cases in favour of the appellants their value must be discounted on the ground that these observations were made

long before the decision of the Privy Council in Girja Bai v. Sadashiv Dhundiraj (1916) L.R. 43 IndAp 151 : ILR C. 1031 : 31 M.L.J. 455 (P.C).

In the present case, a careful examination of the terms of the compromise and the provisions therein that certain items should go to the heirs of

Narayanaswami and the terms of the sale-deed, Ex. C (2), showing that some debts were taken as binding on both the brothers and others on

Narayanaswami alone--all show the unmistakable intention that the brothers should thereafter be separate. So early as Balkrishna Trimbak

Tendulkar v. Savitribai I.L.R.(1878) B. 54 such a conclusion was reached. We are of opinion that the finding of the Subordinate Judge on the

second issue is unsustainable. On the facts of this case the presumption of jointness is overwhelmingly rebutted. Therefore there is no survivorship

of the properties of Natarajulu to the 1st defendant.

3. It is next suggested that the effect of Ex. C (2) is to make Natarajulu liable to pay the plaintiffs' debt out of the whole of the properties. In the first place the sale-deed is only of Narayanaswami's share of the properties. They are transferred to Natarajulu in consideration of his paying off Narayanaswami's debts. The only effect of the covenant in the sale-deed is that Natarajulu is liable as between himself and the vendor to pay off all the debts of the vendor out of all the properties which were the subject of the sale, that is, Narayanaswami's share of the properties, and personally out of the other properties of his own but such a covenant cannot be taken advantage of by the creditors who are no parties to the sale-deed and so far as creditors like the plaintiffs are concerned their remedies are confined to the rights under their documents. The plaintiffs' rights are to sell the mortgaged properties under Ex. A. It may be that if, by non-payment of plaintiffs' debt by Natarajulu, Narayanaswami was put to trouble of some kind, he can sue Natarajulu for damages by reason of the breach of the covenant, but apart from this we cannot see how creditors like the plaintiffs can take advantage of the covenant. Nor can we read anything in the terms of the sale-deed to show an undertaking by Natarajulu that he will pay off all the vendor's debts out of the whole of the family properties. On the other hand, portions of the sale-deed imply that some of the debts are not binding on Natarajulu at all and he is in no way liable for them and, in the case of other debts, he is liable only to the extent of his half share. It is impossible to spell out of these terms an undertaking of Natarajulu in respect of his own share of the properties for Narayanaswami's share of the debts enuring to the benefit of creditors. The analogy of universal donee is invoked by the learned Advocate for the appellants but we are not able to say that this analogy helps him. We are therefore of opinion that the plaintiffs can recover their debts only out of the half share of Narayanaswami in the mortgaged properties.

4. The next question that arises is whether certain of the alienees are entitled to priority over the plaintiffs' mortgage. The following table shows the parties claiming such priority over the plaintiffs, the items in the plaintiffs' mortgage in respect of, which the priority is claimed, the debts by reason of the payment of which such priority is claimed and the last column shows the amount to the extent to which the priority is claimed;--

1 2 3 4

Persons claiming Items in respect of Prior debts Amount to the extent priority. which priority is paid. to which priority is claimed. claimed.

4th Defendant.

5th and 6th Defts. Nos. 1 and 2. Ex.V. Rs. 4,500.

No. 15. Exs. XVI and Rs. 3,900.

XIV (a).

15th Defendant Nos: 8 and 14. Ex. XIV Rs. 5,500.

5. Mr. Varadachariar, the learned Advocate for the appellants, argued first that as Ex. C (2) provides for the payment of Narayanaswami's debts

by Natarajulu, he can himself claim no priority if he pays some of these debts and does not pay others, and that being so, persons claiming through

him can claim no such priority; and secondly, that in the sale-deeds of Natarajulu in favour of the various alienees, they were asked to pay the prior

mortgages and therefore they cannot claim any priority. Now it is clear that where a mortgagor sells his property to a vendee requiring the vendee

to pay off two or three prior debts of the mortgagor and if the vendee pays off only one of them, he cannot claim priority in respect of it over the

others though he may claim such priority in respect of some other debts the payment of which by him was not contemplated. This proposition was

decided in Govindasawmi Thevan Vs. T.M. Doraisawmi Pillai and Others, and both branches of the above statement are illustrated by the decision

in Har Shyam Chow-dhuri v. Shyam Lal Sahu I.L.R.(1915) C. 69. In the latter case it was held that the vendee could claim priority in respect of

the debt X and not in respect of the debts Y or Z. This proposition is conceded by the respondents. The question, however, arises how far this

disability of the vendee applies to transferees from him. In Bisseswar Prosad v. Lala Sarnam Singh (1907) Cri.L.J. 134. it was held that the

transferees also cannot claim such priority--fide the observations at page 139 of Bisseswar Prosad v. Lala Sarnam Singh (1907) Cri.L.J. 134.

beginning with.

In our opinion, they do not, because they had constructive, if not, actual notice of the debt due to Muniram and of the circumstances that Prayag

Lall had assumed payment of it Rajaram v. Krishnasami I.L.R.(1892) M. 301. Hamilton v. Royse (1804) 2 Sch. & Lef. 315 Roddy v. Williams

(1845) 3 Jones & LaTouche 1 Wade on Notice, Sections 311-315-J The conveyance of these defendants under which they purchased the

property from Prayag Lall on the 27th September, 1894, shows that their vendor had acquired title by purchase. If they had investigated his title

and examined his conveyance, as they ought to have done, they would have found therein a statement that money was due to Muniram and that

their vendor Joyram assumed payment of that debt. It further appears from the deposition of defendant 21, Raghunandan, that at the time of the

purchase, he examined the title-deed of Prayag Lall. If, therefore, these defendants had made any enquiry, they would have at once discovered,

that Muniram or his representative was still entitled to enforce his security, and that Prayag Lall, who had assumed payment of the mortgage-debt,

had failed to carry out his undertaking. Under these circumstances, it is impossible to hold that defendants 21 to 24 can claim to stand in a better

position than Prayag Lall himself. They are, consequently, not entitled to be subrogated to the rights of the mortgagee of the 28th May, 1889,

whose debt they satisfied.

6. In the present case a perusal of Ex. C (2) shows the position undertaken by Natarajulu, and all his vendees must be taken to have actual or

constructive notice of Ex. C (2), that is, the title-deed of their vendor, and they cannot pretend ignorance of its contents. No case has been cited to

support the contention of the respondents that the transferees stand in a better position than the transferor. There is no analogy between the relative

positions of such transferor and transferee and the relative position of the mortgagor and his first transferee who would be transferor as against a

second transferee. The relative rights between the two sets of parties are entirely different. The effect of the sale-deed Ex. C (2) is to calculate all

the debts of Narayanaswami up to a particular date and to make them stand on the same footing as on that date. The description of the various

items of consideration show that all the debts were calculated up to the 5th October, 1914 and the total amount of consideration, Rs. 35,000, was

made up as on that date, and neither in the hands of Natarajulu nor in the hands of transferees from him can there be any priority between these

various debts whatever their original dates might have been. It is unnecessary to deal with the larger contention of Mr. Varadachari that wherever

there is a covenant by the vendee to pay off a prior debt of the mortgagor there can be no priority in respect of it. The authorities relied on by Mr.

Rajah Aiyar, for example, *Satnarain Tewari v. Chowdhuri Sheobaran Singh* (1911) Cri.L.J. 500 and *Chidambara Nadan* late a Minor but now

declared a Major and *Another Vs. Musuvati Muni Nagendrayyan and Others*, , show that no such broad proposition can be insisted on and it is

safer to rest the decision in each particular case on the particular intention in that case derived from the facts and not upon any general formula of

that kind. But so far as transferees from the first transferee are concerned there can be no question of their intention, for they stand in no better

position than their transferor and it is unnecessary to examine their intention. After all, the rights conferred upon the transferees who pay off prior

mortgages for using such prior mortgages as a shield are the result of an equitable doctrine in spite of the fact that the mortgages are extinguished,

and where a transferor by reason of his covenants and the transferee by reason of a notice of the transferor's covenants show a different intention,

there is no scope for the application of such an equitable doctrine. The decisions in *Kasim Moideen Rowther v. Annamalai Thevan* (1909) 3 I.C.

936 and in *Thome v. Cann* 14(1895) A.C. 11 do not help the respondents. I therefore hold that the respondents mentioned in the above table

cannot claim priority over the plaintiffs' debts in respect of the half share of *Naraswami's* debt under Ex. V and the other debts of *Nara-*

swami and the other bonds mentioned in the table.

7. The other point which arises in the case is the question of interest. There is no dispute about this. The plaintiffs are entitled to the contract rate up

to the date mentioned in the decree for payment, namely, the 10th April, 1924. The Subordinate judge allowed it up to the date of the decree and

thereafter at 3 per cent. per annum. The appellants will be allowed interest at the contract rate up to 10th April, 1924 and on the consolidated

amount from that date at 6 per cent, per annum up to the date of payment.

8. The decree will be modified according to the second and third of the above findings.

9. The appellants will pay the costs of the 2nd defendant, *Govindammal*. The

appellants will be entitled to proportionate costs on the amounts in respect of which there is a dispute as to priority from the 5th and 6th (in whose place the 4th defendant has stepped in pending appeal) and from the 15th defendant respectively but as to 4th defendant and Ex. V the appellants will be entitled to half the costs.

Jackson, J.

10. I agree.

11. The question of the alienees' priority appears to me to be simply one of fact. They knew that their vendor had undertaken to pay off the mortgages, and they knew that their own sales were effected in pursuance of that undertaking. There is no ground for presuming that with that knowledge they ever intended to keep alive the mortgages which they paid up; and I should find, as a matter of fact, that the idea never crossed their minds. No doubt as observed in *Gokaldas Gopaldas v. Puranmal Premsukh Das*. (1884) L.R. 11 LA. 126 : ILR 10 C. 1035 (P.C.) it may ordinarily be presumed that a man having a right to act in either of two ways has acted according to his interest. But that presumption of fact is rebuttable as shown in *Govindasawmi Thevan Vs. T.M. Doraisawmi Pillai and Others*, . If the party who pays off the mortgage suffers by the presumption not being in his favour, he has only himself to thank for not committing his intention to paper. Although the intention to keep a mortgage alive need not be formally expressed in India, nevertheless such formal expression by way of deed would save parties considerable confusion, litigation and expense.