
(1980) 08 MAD CK 0022
In the Madras High Court
Case No : Appeal No. 310 of 1976

L.M.L.L. Lakshmanan Chettiar APPELLANT
Vs
V.A.R. Alagappa Chettiar and Others RESPONDENT

Date of Decision : 18-08-1980

Acts Referred:

Limitation Act, 1963 — Section 18, 19
Transfer of Property Act, 1882 — Section 67

Citation : AIR 1981 Mad 338 : (1981) 94 LW 152

Hon'ble Judges : Sethuraman, J;Natarajan, J

Bench : Division Bench

Advocate : S. Thyagaraja Iyer and K. Raja, for the Appellant; P. Murugayyan and S. Ramalingam, for the Respondent

Judgement

Natarajan, J.—The plaintiff in O. S. No. 37 of 1971 on the file of the court of the Subordinate Judge of Devakottai is the appellant. He filed

the suit in forma pauperis for recovery of moneys due under a mortgage created by deposit of title deeds by the first defendant on 9-9-1946 in

favour of the plaintiff's father, one Lakshmanan Chettiar. The case of the plaintiff was to the following effect: Defendants 1. 15 and 16 are brothers

and were members of a joint Hindu family. A sum of Rs, 18000 belonging to the joint family of the plaintiff and his father was deposited with the

first defendant for earning interest. The deposit was made in the name of the plaintiff's mother, one Paripoorna Achi. When the plaintiff's father

demanding repayment of the amount in Madras and insisted on furnishing of security in the event of non-payment the first defendant executed a

fresh deposit letter in favour of the plaintiff's father on 9-9-1946 for a sum of Rupees 20,000. The said letter was executed at Madras and on 10-

9-1946 the first defendant delivered the title deeds pertaining to two items of properties, described as Items I and 2 in the plaint 11 with intent to

create a security. Thus an equitable mortgage by way of collateral security was made in favour of the plaintiff's father and the mortgage was still

subsisting. Between the period 3-9-1944 and 26-2-1958, the first defendant had paid certain sums of money amount in all to Rs. 1000 on several

occasions towards the equitable mortgaged. The plaintiff's father died on 22-6-1963 leaving as his heirs his son (the plaintiff), his widow

Paripoorna Achi and a daughter by name Deivanai Achi. The plaintiff's mother and sister had released their shares in the mortgage amount in

favour of the plaintiff by means of a registered release deed dated 21-2-1968. Defendants 2 and 3, knowing fully well the existence of the

equitable mortgage, purchased the one-third share of the first defendant in item 1 of schedule II property on 3-3-1958 in E. P. 81 of 1957 in O S.

74 of 1950 on the file of the Sub Court, Devakottai Likewise one Ramaswami Chettiar who is the father of defendants 4 to 13 and the husband of

the 14th defendant purchased, with full knowledge of the equitable mortgage, the undivided one-third share of the first defendant in item 2 of

schedule II on 9-12-1963 in E. P. No. 22 of 1962 in O. S. 4 of 1949 on the file of the Sub Court, Devakottai. The respective court auction-

purchasers, having purchased the equity of redemption with knowledge of the subsistence of the mortgage are legally bound to discharge the

mortgage debt secured by the equitable mortgage. After the court auction sale in their favour defendants 2 and 3. in collusion with the mortgagor

(first defendant) and his brothers defendants 15 and 16 filed a suit O. S. No. 50 of 1969 on the file of the Sub-Court. Devakottai, for partition of

the properties belonging to the joint family of defendants 1. 15 and 16, and obtained a fraudulent Partition decree under which a small extent of

Property of meager value was allotted to the share of the first defendant. Such a decree had been collusively obtained in order to defeat the

Plaintiff from realising the mortgage debt. Apart from the fraudulent nature of the suit it is also bad in law for partial partition. The plaintiff made

repeated demands on the first defendant and the court auction-purchasers of the one-third share in the mortgaged properties to pay the mortgage

Amount together with interest etc, but they proved of no avail. The fourth defendant died during the tendency of the suit and hence his legal

representatives, defendants 17 to 21, were brought on record. Since defendants 2 and 3 as well as defendants 5 to 14 and 17 to 21 have

purchased the one-third share of the first defendant with full knowledge of the subsistence of the mortgage, they are bound in law to discharge the

mortgage debt. Except the properties mentioned in the Plaint defendants 1, 15 and 16 were not possessed of any other Properties. Hence the

Plaintiff prayed for a mortgage decree being passed against defendants 1 to 14 and 17 to 21 directing them to pay a sum of Rs. 38,883.67 with

subsequent interest and costs and in the event of default to direct the one-third share of the first defendant in the mortgaged items of Properties

being brought to sale ignoring the partition effected by means of the decree passed in O. S. 50 of 1959. Alternatively the plaintiff prayed that if for

any reason, the partition effected in O.S.No. 50 of 1959 was considered any the Court to be a genuine one, the decree should provide for bringing

to sale the portion of the property in item 1 allotted to the first defendant in the partition suit and the undivided one-third share of the first defendant

in item 2 of the properties.

2. The first defendant and defendants 5 to 13 and 15 to 21 (defendants 11 to 21 being the legal representatives of the deceased fourth defendant)

remained absent and allowed the suit to proceed ex parte. Defendants 2 and 3 contested the suit and their defence, set out in the written statement

of the second defendant and adopted by the third defendant was to the following effect defendants 2 and 3 did not admit the truth and genuineness

of the deposit transaction and the passing of consideration and likewise the, execution of the deposit letter dated 9-9-1946 and the deposit of title

deeds on 10-9-1946 for the Purpose of creating an equitable mortgage. The truth and genuineness of the various payments on several dates said to

have been made towards the mortgage was also not admitted. Defendants 2 and 3 had advanced moneys to the first defendant and for the

repayment of the same the first defendant had executed promissory notes. For recovery of moneys due under the promissory notes, the suit O. S.

74 of 1950 were filed in the Sub Court. Devakottai and the suit were decreed on 20-7-1950. The one-third share of the first defendant in item 1

was attached and it was purchased in court auction on 3-3-1958 and the sale was confirmed and symbolical delivery was also obtained.

Thereafter, O. S. 50 of 1959 was filed for partition of the one-third share of the first defendant. An ex parte decree was passed and the first defendant attempted to have the ex parte decree set aside but he failed before the trial court. The appellate court, however ordered setting aside of the ex parte decree, provided the first defendant furnished security but the first defendant committed default and therefore, the partition decree became final. Later on, the first defendant with it view to protract the proceedings set up his two sons to, file O. S. No. 30 of 1965 before the District Munsif Court. Deva kottai, to set aside the decree in O. S. 50 of 1959. The suit was dismissed and against that, the first defendant's sons filed A. S. 49 of 1966 and that was also dismissed. The sons then filed a second appeal to the High Court, which was vending on the date of the institution of the present suit. (Subsequently the second appeal has also been dismissed). In the final decree proceedings in O. S. 50 of 1959, a compromise final decree was passed and delivery was also affected. The sons of the first defendant applied to the executing court for ordering redelivery on the pretext that a larger extent of property had been taken delivery of and when those proceedings were pending, the first defendant has instigated the plaintiff to come forward with the present suit to make it appear that the properties were subject to an equitable mortgage and hence, the plaintiff was not entitled to the grant of any Relief in the suit. The defendants did not admit the plaint statement that the mother and sister of the plaintiff had released their rights under a release deed in favour of the plaintiff. In any event, defendants 2 and 3 were bonafide purchasers for value without notice and it was not correct to say that they had knowledge of the equitable mortgage before they purchased the one-third share of the first defendant without knowledge of the equitable mortgage, and consequently, without any cloud on the title to the property. The plaintiff did not intervene in the execution proceeding, nor did he take steps to enforce his alleged equitable mortgage and so he is stopped from seeking enforcement of the mortgage against defendants 2 and 3 it is false to say that there has been collusion between defendants 1 to 3 and 15 and 16 the compromise final decee was a bana fide one and fair and equitable in its terms and hence the plaintiff cannot ask for the decree being ignored and the property brought to sale. Even if the suit claim was true, it was

barred by limitation.

3. The 14th defendant filed a separate written statement and contended that no amount was due to the plaintiff's father or to the plaintiff under the

alleged equitable mortgage and the genuineness of the mortgage transaction itself was disputed. Her husband N. P. N. Ramaswami Chettiar did

not. Purchase item 2 of schedule II property with knowledge of the equitable mortgage. The plaintiff is stopped from enforcing the mortgage right,

as he did not intervene in the execution proceedings in which the mortgaged properties were brought to sale. The suit was barred by limitation. The

payments and endorsements referred to by the plaintiff were not true. No amount was due to the plaintiff and the suit properties were not subject

to any encumbrance. The suit had been filed by the plaintiff in collusion with the first defendant and therefore deserved to be dismissed with costs.

4. On the basis of the pleadings of the parties the Subordinate Judge raised the following issues for consideration in the trial -

1. Whether the suit mortgage is true and valid? (as recast by the trial court).

2. Whether the partition set up by the defendants 2 and 3 is true, valid, equitable and binding on the Plaintiff? (as recast).

3. Whether the suit is barred by limitation? (as recast) and

4. To what relief is the Plaintiff entitled? (as recast).

In the trial of the suit, the plaintiff examined P. Ws. 1 to 5 and filed Exs. A, 1 to A. 24 and for the contesting defendants, the 2nd defendant alone

was examined and no defence exhibits were filed. The trial Judge. On a consideration of the materials placed before him, answered issue 1 in

favour of the Plaintiff. But found against him on issues 2 and 3, and consequently, found under issue 4 that the plaintiff was not entitled to any relief

and dismissed the suit by judgment and decree dated 21-6-1975. It is against the dismissal of the suit the plaintiff has preferred this appeal.

5. Notice to respondents 1, 4 to 7, 14 and 15 was dispensed with in the appeal. The rest of the respondents, except respondents 2 and 3, have

not entered appearance in spite of service of notice on them.

6. Mr. K. Raja, learned counsel for the appellant-plaintiff, advanced arguments before us to contend that the findings of the Subordinate Judge on

issues 2 and 3 are erroneous and unsustainable in law and facts and that the appellant is entitled to the relief's claimed by him in the suit. Mr.

Murugayyan, learned counsel for the respondents 2 and 3, stated that his clients had conveyed their rights in item I of the plaint schedule II to the appellant himself and as such, the appeal is not maintainable against his clients. Mr. Raja refuted the statement of Mr. Muragayyan and submitted that the appellant had not acquired the rights of respondents 2 and 3 in the concerned item of suit property and the appellant is entitled to pursue the appeal against, respondents 2 and 3 also. Consequently, we have heard Mr. Raja and as well as Mr. Murugayyan with reference to the pleas put forward by the appellant and respondents 2 and 3 in the trial of the case.

7. The questions that fall for determination may be enunciated thus-

1. Whether the sum of Rs. 18000 was originally deposited with the first defendant by the appellant's father and whether in respect of that deposit

the first defendant was indebted in a sum of Rs.20000 to the appellant's father as on 9-9-1946?

2. If the deposit was true, whether the first defendant deposited the title deeds of items 1 and 2 of schedule II to the plaint on 10-9-1946 and

created an equitable mortgage by way of collateral security?

3. Whether the suit is barred by limitation?

4. Whether respondents 2 and 3 were bona fide purchasers for value, without notice of the mortgage of item 1 of schedule II and likewise,

whether Ramaswami Chettiar was a bona fide purchaser for value without notice of the mortgage, of item 2 of schedule II and

5. Whether the appellant is entitled to ignore the partition decree in O.S 50 of 1959 and seek enforcement of the mortgage by bringing to sale the

one-third share of the first respondent in items 1 and 2 of plaint schedule II?

8. Taking up first and second questions as they can be conveniently disposed of together, there does not appear to be any difficulty in accepting

the appellant's case. Though defendants 2 and 3, in their respective written statements, had disputed the factum of the deposit as well as the

creation of the equitable mortgage and put the appellant to strict proof of those matters they do not appear to have seriously canvassed their

objections before the trial court. In any event the appellant has incontrovertibly proved his case with reference to the deposit and the creation of

the equitable mortgage. P.W.5, the mother of the appellant, has stated that she sold her jewels and gave the money through her husband to the first

respondent for being deposited with him for augmenting her funds and as on 9-9-1946, she was entitled to get Rs. 20496.26 when a demand was made for return of the same, the first respondent paid Rs. 498.26 in cash and executed a fresh deposit letter. Ex. A.1 for the sum of Rs.20000 the demand as well as the execution of Ex.A 1 took place at Madras. There is further evidence to show that on the next day viz. 10-9-1946, the first respondent delivered the title deeds Exs.A.3 to A.9 pertaining to the suit properties with intent to create an equitable mortgage by way of collateral security.P.W.1 a close relation of the first respondent, has deposed about the first respondent executing the two deposit letters Exs A 2 and A.1 respectively and about the first respondent depositing the title deeds at madras and creating an equitable mortgage.P.W.2 an advocate's clerk has deposed that the first respondent took advice from his master, viz. Mr.Ramaswami, Advocate, as to how an equitable mortgage was to be created and on 10-9-1946 he accompanied the first respondent to the appellant's father and witnessed the deposit of title deeds for the purpose of creating an equitable mortgage. Besides P.Ws.1 and 2 P.W. 5 has also spoken about the first respondent executing Ex.A.1 and depositing his title deeds on the next day by creating a mortgage by way of collateral security. The evidence of these witnesses is amply corroborated by the production of the original title deeds Exs. A. 3 to A. I. by the appellant. Besides it is also seen that the first respondent has made four payments between 1949 and 1958 totaling a sum of Rs.1000 and all those payments have been entered an the reverse of Ex. A. 2. These factors more than amply prove the truth of the appellant's case about the deposit of money with the first respondent and about his executing the deposit letter and creating an equitable mortgage over the suit properties by deposit of title deeds. Hence both these points are found in favour of the appellant.

9. Next in order comes the third question about the suit being within time or barred by limitation. The deposit letter Ex.A.1 has been executed on 9-9-1946 and the equitable mortgage has been created the next day. The suit however has been filed on 16-9-1969 It may be remembered that the suit has been filed in forma pauperis and 16-6-1969 was the day when the petition under O.XXXIII R.I.C.P.C was filed. As such, the suit has been filed beyond 12 years from the date of Ex. A.1. however, the case of the

appellant is that the first respondent had made four payments towards the mortgage and the last of such payment was made on 22-9- 1958, and as such, the period of limitation was extended and by reason of such extension, the suit must be held to have been filed within time. The for payments referred to by the appellant have taken place on the following dates -- Rs. 100 paid on 5-9-1949; Rs.100 paid on 15-8-1952; Rs.300 paid on 3-5-1955 and Rs.500 paid on 26-2-1958 besides the appellant also replied upon two acknowledgments. Exs.A. 2 and A.13 made by the first respondent on 13-7-1957 and 22-9-1958 respectively. Ex.A 12 is a certified copy of the counter-affidavit filed by the first respondent in E.P.81 of 1957 in O.S.74 of 1950, sub court .Devakottai. Ex. A. 13 dated 22-9-1958 is yet another counter-affidavit filed by the first respondent in the same execution petition. In both these counter-affidavits the first respondent has clearly referred to the execution of the deposit letter and the creation of the equitable mortgage over them 1 and 2 of the plaint schedule I and about the mortgage still subsistent. The Subordinate Judge has, however taken the view that the payments made by the first respondent as endorsed by him on the reverse of Ex. A.1 cannot save the period of limitation since the endorsements do not make any reference to the first respondent having executed Ex.A.1 and depositing the title deeds for creating an equitable mortgage by way of collateral security. The trial Judge has further held that at best the endorsements could be taken to be acknowledgments of the deposit of money under Ex. A. 1 and not an acknowledgement of a subsisting mortgage liability in as much as there are no details about the delivery of documents the number of documents. The date of delivery, the creation of an equitable mortgage for the purpose of furnishing security and the subsistence of the mortgage none of the endorsements, much less the last one dated 26-2-1958, could be taken as acknowledgment so as to give a fresh period of limitation. For holding that Exs.A.12 and A.13 also did not operate as acknowledgments for saving limitation, the Subordinate Judge has observed that the recitals in the counter affidavit did not unequivocally refer to the deposit of title deeds, the nature of the properties covered by them etc., and about the mortgage being subsisting. We are clearly of opinion that the view taken by the Subordinate Judge on the question of limitation is patently

wrong and manifestly opposed to law. The Subordinate Judge has failed to see that with the creation of the equitable mortgage the debt became a

secured one and the two transaction viz, the acknowledgment of liability under the deposit letter and the creation of the equitable mortgage,

became an integrated transaction, and as a result thereof, any endorsement of payment contained in Ex.A.1 will automatically extend the period of

the mortgage. There need not be as the Subordinate Judge has thought, an independent acknowledgment of the mortgage liability. In this

connection we need only refer to Sections 18 and 19 of the Limitation Act 1963 section 18 deals with the making of an acknowledgment of

liability before the expiration of the period prescribed for a suit or application in respect of a property or right. Section 19 deals with payment on

account of a debt or of interest on a legacy being made before the expiration of the prescribed period by the person liable to pay the debt or

legacy or by his agent duly authorized in that behalf and a fresh period of limitation being computed from the time when the payment was made.

The difference between the two sections has been succinctly set out in Parasuraman and Others Vs. Purushothaman and Co. and Others, and we

may quote the relevant passage as we are in respectful agreement with the same. The passage runs thus-

There is certainly a difference between Section 18 and Section 19. As in the case of an acknowledgment u/s 18, a payment u/s 19 is also required

to be recorded in writing. But u/s 18, the writing must contain within itself an admission of existing liability; while u/s 19 it is sufficient if the writing

merely records the fact of payment. An endorsement of payment need not imply an acknowledgment of liability, whereas an acknowledgment for

the purpose of Section 18 must be by the person against whom the property or right in question is claimed or by some person through whom he

derives title or liability, a payment for the purpose of Section 19 need only be by the person liable to pay the debt. An acknowledgment u/s 18 only

operates against the person who makes the acknowledgment and those claiming under him, but subject to the provisions of sub-sec. (2) of Section

20, a payment under Sec. 19 saves limitation against all the persons who are liable for the debt.

Thus it may be seen that while u/s 18, there should be an acknowledgment of liability, u/s 19 an endorsement of payment need not imply an

acknowledgment of liability. The mere fact of payment as evidenced by the endorsement will have the effect of extending the period of limitation.

This aspect of the matter has been completely lost sight of by the Subordinate Judge. Once the liability of the first respondent under the deposit

became measured by the creation of the equitable mortgage it goes without say in that any endorsement of payment contained in the letter of

deposit would automatically have the effect of extending the period of limitation for the secured debt. We may, in this connection refer to *Mogulluri*

Vira Raghavayya Vs. Kovaluri Sita Ramayya and Others, where the effect of endorsement on a note had to be construed vis-a-vis a

contemporaneous agreement executed by the promised to pay the amount in installments. The ratio laid down by *Shahabudeen J.* as contained in

the head note, is to the following effect-

Where a promissory note was executed and on the same date an agreement was also come to between the parties that the amount of the note

should be paid in installments. Held that the promissory note, and agreement should be considered as part of the same transaction and the

endorsement on the note would give the indorsee the advantage, which could be derived from the agreement, even though there is no separate

assignment of the agreement. Thus treated an endorsement of payment on the note made more than three years from its execution would save

limitation in respect of Installments payable within three years of the endorsements under the agreement abovementioned.¹¹

10. Applying this ratio, which has our approval we must hold that the payments made by the first respondent and evidenced by the endorsement

contained in Ex. A. I would have the effect of extending the period of limitation for the equitable mortgage. Viewed thus the last endorsement of

payment made on 26-2-1958 conferred on the appellant a limitation period of 12 years from that date to file the suit, and, inasmuch as the suit had

been filed on 16-6-1969 itself we must hold that the suit was not barred by limitation. Apart from that we also find that in Exs A. 12 and A. 13,

the first respondent has categorically and unambiguously, acknowledged his liability under the equitable mortgage and such acknowledgments

clearly attract the application of Section 18 of the Limitation Act. There was no necessity for the first respondent to refer in Exs. A. 12 and A. 13 to

the details of the mortgage transactions, such as the date of delivery of the documents etc. The acknowledgment in Exs. A. 12 and A. 13 clearly

refer to items I and 2 of schedule 11 properties being subjected to the mortgage created in favour of the appellant's father and about the mortgage

still subsisting. Hence Exs A. 12 and A. 13 also can be availed of by the appellant for effectively meeting the plea of limitation raised by the

contesting respondents. Accordingly we answer this question in favour of appellant.

11. The penultimate question is with reference to the rights acquired by the court auction purchasers when the mortgage was subsisting. There is no

material for us to hold that respondents 2 and 3 had not parted with consideration for purchasing items I of schedule II, property. So too the

purchase of item I of schedule 11 property by late Ramaswami Chettiar. But, on the question of notice the court auction purchasers cannot

certainly, plead want of knowledge of the subsistence of the mortgage when they Purchased the respective items of Properties. In Exs. A. 12 and

A. 13, which are the counter affidavits filed by the first respondent in the execution proceedings, he has clearly referred to the creation of the

equitable mortgage over the two items of properties in favour of the appellant's father and about the subsistence of the mortgage. In spite of the

first respondent having brought to their notice the creation of the mortgage and the liability being still outstanding, the auction purchasers who were

also the decree-holders had not taken steps to amend the sale proclamation and bring the properties to sale subject to the rights of the mortgagee.

The Subordinate, judge has not at all applied his mind to this aspect of the matter and. on the other hand he has taken it for granted that the court

auction Purchasers were bona fide purchasers for value without notice. The view of the Subordinate Judge is clearly wrong. Hence we answer the

fourth question also in, favour of the appellant.

12. There only remains the last question. Viz. whether the appellant can ignore the partition decree passed in O. S. No. 50 of 1959 and enforce the

mortgage by bringing to sale the one-third share of the first respondent in the mortgaged items of properties. The case of the appellant is that

respondents to 3. 15 and 16 colluded among themselves and brought about a collusive partition decree in O. S. 50 of 1959 where under the

mortgaged" items of properties were allotted as between the 15th and 16th respondents and the Court auction purchasers and some worthless

items of properties were allotted to the first respondent towards his share. Neither the plaint nor the decree passed in O. S. 50 of 1959, had been

marked as an exhibit and. therefore, the details of the suit and the decree passed therein are not fully known. Even so we find that respondents 2

and 3 had filed O. S. 50 of 1959 the partition of the one-third share of the first respondent in item I of Sch 11 Strangely enough respondents 2 and

3 had not impleaded the appellant as a party to that suit even though they had knowledge of the subsistence of the mortgage. They had also been

specifically put on notice by the appellant himself by means of the notice. Ex. A. 14 issued on 25-3-1968. In that notice, the appellant has

mentioned about the equitable mortgage created by the first respondent and he has also charged respondents 2, 3, 15 and 16 with having filed the

partition suit. O. S. 50 of 1959 collusively and attempting to by-pass the mortgage and have the properties divided. Respondents 2 and 3 have sent

a reply under Ex. A. 15 which contains nothing but a denial of the claim made by the appellant. Similarly, under Ez. A. 16 dated 9-8-1968, the

appellant has sent a notice to respondents 4 to 14 and brought to their notice the subsistence of the mortgage. These respondents too rested

themselves content by merely refuting the contentions of the appellant and sending a reply Ex. A. 16. It is after the issue of these notices

respondents 1 to 3, 15 and 16 had entered into a compromise and brought about a Compromise decree in the partition suit.

According to the appellant the first respondent had been given some worthless items of properties towards his one-third share. The circumstances

are more than enough to warrant the conclusion that the parties to O. S. 50 of 1959 had deliberately attempted to circumvent the mortgage liability

by not allotting to the first respondent any portion of the two items of mortgaged properties and instead allotting him some other items of

properties. In spite of it, the Subordinate Judge very strangely, has taken the view that there was absolutely nothing to show that the Partition was

mala fide and inequitable and that because the appellant (plaintiff) was not a party to O. S. 50 of 1959, it cannot be said that the partition action

was fraudulent in character. The law on the question as to how far a mortgage created by one of two or more co-sharers of his undivided share in

the properties held jointly by all the co-sharers can affect the right, of partition of the other co-sharers. is by now well settled. The Privy Council,

following its ratio in an earlier case, *Bajinath Lai v. Ramoodeen Chowdry*. 1874) 1 Ind Am 106 laid down in *Afzal Khan v. Abdul Rahman* (1932)

36 MLW 456: AIR 1932 PC 235 as follows-

Where one of several co-sharer mortgages his undivided share in some of the properties held jointly by them and the property mortgaged is

allotted on a subsequent partition to the other co-sharers, the latter takes that property in the absence of fraud free from the mortgage, and the

mortgagee can proceed only against the properties allotted to the mortgagor in substitution of his undivided share

This has been followed in *Issaku v. Seetharamaraju* (1947) 60 MLW 480: ILR (1948) Mad 454: AIR 948 Mad I According to this ratio,

respondents 15 and 16, the brothers of the first respondent, will be entitled to ask for portion and allotment of the mortgaged items of properties to

their share free from the mortgage in spite of the creation of the equitable mortgage by the first respondent of his one-third share. However, their

right to ask for partition is subject to the condition that their claim is not vitiated by fraud. in the instant case, the materials on record clearly spell

out the practice of fraud. We have already referred to the court auction purchasers purchasing the one-third share of the first respondent in the

mortgaged items of properties in spite of being made aware of the creation and subsistence of the mortgage.

Later on, when a partition suit was instituted by respondents 2 and 3 they as well as the other court auction purchaser were put on notice of the

subsistence of the mortgage and warned of the consequences of any collusive arrangement being entered into. In spite of the notices, respondents

1 to 3, 15 and 16 had brought about a compromise partition decree and, in the said decree, the mortgaged items of properties have been allotted

to the other parties and some other items of properties which, according to the appellant are worthless, were allotted to the first respondent. Those

materials clearly establish the practice of fraud by the respondents. In such circumstances, the normal rights available to co-sharers for asking for a

partition of the mortgaged items of properties free of the mortgage cannot be claimed by respondents 15 and 16 the resultant position is that the

appellant will be entitled to ignore the partition decree passed in O.S.50 of 1959 and enforce the mortgage against the one-third share of the first respondent in items 1 and 2 of schedule II properties.

13. In accordance with our conclusions, it follows that the appeal has to be allowed and the judgment and decree of the lower court set aside. The

appellant's suit will stand decreed and there will be a mortgage preliminary decree in favour of the appellant, directing the defendants 1 to 3,5,

to 14 and 17 to 21 to pay the appellant the sum of rupees 38,882-07, with interest at 6 per cent per annum from the date of plaint till the date of

payment and costs, within three months from this date, failing which the one-third share of the first respondent in items 1 and 2 of plaint II schedule

will be sold for realizing the amount and such sale will be effected in disregard of the partition decree passed in O.S.50 of 1959 the court-fee

payable on the plaint as well as the memorandum of appeal will be paid by respondents 1 to 13 and 16 to 29.

14. The matter comes up before us for being mentioned. The learned counsel for the appellant states that the court below has ordered costs to be

borne by the respective parties and as such the award of costs in this appeal may be clarified as cost in the appeal. In view of the said

representation, we make it clear that award of costs will be in the appeal and as far as the suit is concerned the parties will bear their respective

costs.

15. Appeal allowed.