
(1980) 08 MAD CK 0023
In the Madras High Court

L.R.M.L.L. Lakshmanan Chettiar

APPELLANT

Vs

V.AR. Alagappa Chettiar and Others

RESPONDENT

Date of Decision : 18-08-1980

Acts Referred:

Limitation Act, 1963 — Section 18

Citation : (1981) 94 LW 152 : (1981) 1 MLJ 232

Hon'ble Judges : S. Natarajan, J;Natarajan, J

Bench : Full Bench

Judgement

S. 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 9th

September, 1946 in favour of the plaintiff's father, one Lakshmanan Chettiar. The case of the plaintiff was to the following effect:

2. Defendants 1, 15 and 16 are brothers and were members of a joint Hindu family. A sum of Rs. 18,000 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

Paripoornam Achi. When the plaintiff's father demanded 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 9th September, 1946 for a sum of Rs. 20,000.

The said letter was executed at Madras and on 10th September, 1946 the first defendant delivered the title deeds pertaining to two items of

properties, described as items 1 and 2 in the plaint schedule II 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 5th September, 1949 and 26th

February, 1958, the first defendant had paid certain sums of money amounting in all to Rs. 1,000 on several occasions towards the equitable

mortgage. The plaintiff's father died on 22nd June, 1963 leaving as his heirs his son, (the plaintiff), his widow Paripooranam Achi, and a daughter

by name Deivanai Achi. The plaintiffs mother and sister had released their shares in the mortgage amount in favour of the plaintiff by means of a

registered release deed dated 21st September, 1968. Defendants 2 and 3, knowing full well the existence of the equitable mortgage, purchased the

one-third share of the first defendant in item I of Schedule II property on 3rd March, 1958, in E. P. No. 81 of 1957 in O. S. No. 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 9th December, 1963, in E. P. No. 22 of 1962 in O. S. No. 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 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 meagre 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 pendency 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 1,13 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 P. 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. No. 30 of 1959. Alternatively, the plaintiff prayed that if, for any reason, the partition effected in O. S. No. 50 of 1969 was considered by the Court to be a genuine one, the decree should provide for bringing to sale the portion of 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.

3. The first defendant and defendants 5 to 13 and 15 to 21(defendants 17 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 latter dated 9th September,

1946 and the deposit of title deeds on 10th September, 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 were 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. No. 74 of 1950 was filed in the Sub-Court, Devakottai and the suit was decreed on 20th July, 1950.

The one-third share of the first defendant in item 1 was attached and it was purchased in Court-auction on 3rd March, 1958, and the sale was

confirmed and symbolical delivery was also obtained. Thereafter, O. S. No. 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 a view to protract the proceedings,

set up his two sons to file O. S. No. 30 of 1965 before the District Munsif's Court, Devakottai, to set aside the decree in O. S. No 50 of 1959.

The suit was dismissed and against that, the first defendant's sons filed A. S. No. 49 of 1966 and that was also dismissed The sons then filed a

second appeal to the High Court which was pending 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. No. 50 of 195(sic), a compromise final decree was passed and delivery was also

effected. The sons of the first defendant applied to the executing Court for ordering re-delivery 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 bona fide purchasers for value without notice and it was not correct to say that they

had knowledge of the equitable mortgage before they purchased the first defendant's one-third share in the Court-auction-sale. 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 proceedings, 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 decree was a bona 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.

4. The fourteenth 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 of Schedule II property with knowledge of the equitable mortgage. The plaintiff is estopped 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.

5. 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).

6. In the trial of the suit, the plaintiff examined P Ws. No. 1 to 5 and filed Exhibits A-1 to A-24 and for the contesting defendants the second

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 plaintiff was not entitled to any

relief and dismissed the suit by judgment and decree dated 21st June, 1975. It is against the dismissal of the suit the plaintiff has preferred his

appeal.

7. 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.

8. 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.

Murugaiyan, learned Counsel for the second and third respondents, stated that his clients had conveyed their right in item 1 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. Murugaiyan 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

prosecute the appeal against respondents 2 and 3 also. Consequently, we have heard Mr. Raja as well as Mr. Murugaiyan with reference to the

pleas put forward by the appellant and respondents 2 and 3 in the trial of the case.

9. The questions that fall for determination may be enunciated thus:

1. Whether a sum of Rs. 18,000 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. 20,000 to the appellant's father as on 9th September, 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 10th September,

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

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. No. 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?

10. Taking up the 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 4, 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 9th September, 1946, she was entitled to get Rs. 20,498-2-6.

When a demand was made for return of the same, the first respondent paid Rs, 498-2-6 in cash and executed a fresh deposit letter, Exhibit A-1,

for the sum of Rs. 20,000. The demand as well as the execution of Exhibit A-1 took place at Madras. There is further of evidence to show that on

the next day viz., 10th September, 1946, the first respondent delivered the title deeds, Exhibits 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, Exhibits 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 10th September, 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 Exhibit 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, Exhibits A-3 to A-9 by the

appellant. Besides, it is also seen that the first respondent has made four payments between 1949 and 1958 totalling a sum of Rs. 1,000 and all

those payments have been entered on the reverse of Exhibit 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.

11. Next in order comes the third question about the suit being within time or barred by limitation. The deposit letter, Exhibit A-1, has been

executed on 9th September, 1946, and the equitable mortgage has been created the next day. The suit however has been filed on 16th September, 1969. It may be remembered that the suit has been filed in forma pauperis and 16th June, 1969, was the day when the petition under Order 33, Rule 1, CPC was filed. As such, the suit has been filed beyond twelve years from the date of Exhibit 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 payments was made on 22nd September, 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 four payments referred to by the appellant have taken place on the following dates: Rs. 100 paid on 5th September, 1949; Rs. 100 paid on 15th August, 1952; Rs. 300 paid on 31st May, 1955 and Rs. 500 paid on 26th February, 1958. Besides, the appellant also relied upon two acknowledgments. Exhibits A-12 and A-13, made by the first respondent on 13th July, 1957 and 22nd September, 1958 respectively. Exhibit A-12 is a certified copy of the counter-affidavit filed by the first respondent in E. P. No. 81 of 1957 in O. S. No. 74 of 1950, Sub-Court, Devakkottai. Exhibit A-13 dated 22nd September, 1958, is yet another counter-affidavit filed by the first respondent in the same execution petition. In both those counter-affidavits the first respondent has clearly referred to the execution of the deposit letter and the creation of the equitable mortgage over items 1 and 2 of the plaint Schedule II and about the mortgage still subsisting. The Subordinate Judge has, however, taken the view that the payments made by the first respondent as endorsed by him on the reverse of Exhibit A-1, cannot save the period of limitation since the endorsements do not make any reference to the first respondent having executed Exhibit 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 Exhibit A-1 and not an acknowledgment of a subsisting mortgage liability; inasmuch 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 26th February, 1958, could be

taken as acknowledgment so as to give a fresh period of limitation. For holding that Exhibits 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 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 transactions, 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, endorsement

of payment contained in Exhibit 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 Section 18 and 19 of the Limitation

Act, 1963. Section 18 deals with the making of an acknowledgment of a 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 authorised 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 under

Section 18 only operates against the person who makes the acknowledgment and those claiming under him, but subject to the provisions of Sub-

section (2) of Section 20, a payment u/s 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 secured by the creation of the equitable mortgage, it goes without saying 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 promisor 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 instalments, Held, that the promissory note and the agreements should be considered as parts 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. Thus treated, an endorsement of payment on the note made more than three years from its execution would save limitation in respect

of instalments payable within three years of the endorsement under the agreement abovementioned.

Applying this ratio which has our approval we must hold that the payments made by the first respondent and evidenced by the endorsements

contained in Exhibit A-1 would have the effect of extending the period of limitation for the equitable mortgage. Viewed thus, the last endorsement

of payment made on 26th February, 1958, conferred on the appellant a limitation period of twelve years from that date to file the suit, and,

inasmuch as the suit had been filed on 16th June, 1960 itself, we must hold that the suit was not barred by limitation. Apart from that, we also find

that in Exhibits 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 Exhibits A-12 and A-13 to the details of the mortgage transaction, such as the date of delivery of the documents etc. The

acknowledgments in Exhibits A-12 and A-13 clearly refer to items 1 and 2 of Schedule II properties being subjected to the mortgage created in

favour of the appellant's father and about the mortgage still subsisting. Hence Exhibits 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 the appellant.

12. 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 item 1 of Schedule II property. So too, the

purchase of item 2 of Schedule II 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 Exhibits 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.

13. 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 1 to 3, 15 and 16 colluded among themselves and brought about a collusive partition decree in O. S. No. 50 of 1959 whereunder 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. No. 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. No. 50 of 1959 for partition of the one-third share of the first respondent in item 1 of Schedule II 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, Exhibit A-14 issued on 25th March, 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. No. 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 Exhibit A-15 which contains nothing but a denial of the claim made by the appellant. Similarly, under

Exhibit A-16 dated 9th February, 1968, the appellant has sent a notice to respondents 4 to 14 and brought to their notice the subsistence of the

mortgage. Those respondents too rested themselves content by merely refuting the contentions of the appellant and sending a reply, Exhibit A-17.

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 has 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. No. 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. No. 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, *Baijnath Lal v. Ramooddeen Choudhary* 1. (1873-74) 1 I.A. 106 laid down in *Afzal Khan v.*

Abdul Rahman (1932) 36 LW 456 : LR 59 IA 405 : 63 MLJ 664 : AIR 1932 PC 235 as follows:

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

allotted on a subsequent partition to the other co-sharers, the latter take 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.

(Italics supplied)

This has been followed in *Issaku v Seetharamaraju* (1947) 2 M L J 165 : 60 LW 480 : ILR (1948) Mad 454 : AIR 1948 Mad 1(FB). According

to this ratio, respondents 15 and 16, the brothers of the first respondent, will be entitled to ask for partition 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 13 and 16. The resultant position is that the appellant will be entitled to ignore the partition decree passed in O. S. No. 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.

14. 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 Rs. 38,883-67 p. 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 Schedule II will be sold for realising the amount and such sale will be effected in disregard of the partition decree passed in O. S. No. 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 20.

15. This appeal having been set down for ""Being mentioned"" on this day the Court made the following Order:

The Order of the Court was made by
Natarajan, J.

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

respective costs.