

(1968) 12 MAD CK 0007
In the Madras High Court

M. Lakshmanan Chettiar and Another	APPELLANT
Vs	
Palaniswami Chettiar and Others	RESPONDENT

Date of Decision : 11-12-1968

Acts Referred:

Transfer of Property Act, 1882 — Section 58(a)

Citation : (1969) 82 LW 609 : (1970) 1 MLJ 200

Hon'ble Judges : R. Sadasivam, J

Bench : Division Bench

Judgement

R. Sadasivam, J.—Appellants filed the suit in the lower Court to recover Rs. 33,440 on three registered security bonds, Exhibits A-1 dated

1st November, 1957, Exhibit A-2 dated 4th September, 1948 and Exhibit A-3 dated 6th April, 1951, executed by the first defendant in their

favour for Rs. 5,000, Rs. 10,000 and Rs. 3,000 respectively, hypothecating the properties covered by the plaint A, B and C Schedules

respectively. The plaintiffs released some of the items of the hypotheca and sued to recover the amounts due to them from the remaining items

alone, which are described in the plaint D Schedule. The security bonds were intended to cover future advances upto the limit mentioned in each

and such advances were evidenced by promissory notes executed by the first defendant in favour of the plaintiffs. The learned Second Additional

Subordinate Judge, who tried the suit, found that the security bonds, Exhibits A-1 to A-3 are true, that the promissory notes Exhibits A~4 and A-8

are fully supported by consideration that the arrangement pleaded by the first defendant in paragraph 4 of his written statement that by virtue of the

plaintiffs being in possession of the properties covered by the nominal sale deed Exhibit A-32, dated 17th December, 1951 in favour of P.W. 2,

Manickam Chettiar, the amounts due to the plaintiffs in respect of their dealings with him have been discharged, is not true, that the first defendant

and his son the second defendant are not entitled to the benefit of Madras Act IV of 1938 and that in the result the appellants are entitled to the

amount claimed by them; he however granted a mortgage decree only to the extent of Rs. 15,000 over items 1 and 2 of the plaint D Schedule in

respect of the security bonds Exhibits A-1 and A-2 and a mortgage decree for Rs. 1,200 with interest over items 4 to 6 of the plaint D Schedule in

respect of the security bond Exhibit A-3 on the ground that the security bonds could be enforced only upto the limit of the amounts mentioned

therein and not in respect of the interest on the loans advanced; and that item 3 of the plaint D Schedule now owned by the third defendant cannot

be proceeded against as it was released by an agreement between the plaintiffs and P.W. 2, Manickam Chettiar, the vendee under Exhibit A-32.

Defendants 4 and 5 are only subsequent alienees. There is no appeal by any of the defendants.

2. The only two points urged by the learned Advocate for the appellants (plaintiffs) are that they are entitled to a mortgage decree in respect of the

entire amounts claimed by them as the amounts claimed by them over and above the amounts secured under the documents Exhibits A-1 and A-2

represent only interest and that as they have not released the house, item 3 of the plaint D schedule, they are entitled to proceed against that item

also.

3. The registered security bonds Exhibits A-1 to A-3 have been executed by the first defendant to secure future advances upto the limit of the

amounts mentioned therein and the security bonds could be enforced only for advances up to the maximum limit mentioned in the bonds. But the

learned Second Additional Subordinate Judge has failed to note that though the plaintiff's are entitled to claim larger amounts, they have confined

their claims to the principal amounts mentioned in Exhibit A-1 and A-2, and the interest thereon at 12 per cent per annum. The same question does

not arise in respect of the third registered security bond, Exhibit A-3 as the plaintiffs have confined their claim to a sum of Rs. 1,200 in respect of

the claim under that document. The maximum limit of future advances secured under the documents, Exhibits A-1 and A-2, could refer only to the

principal amounts, and not to subsequent interest. It is meaningless to contend that if a person advances moneys upto the limit mentioned in the mortgage deed intended to secure future advances, he cannot claim a charge in respect of the interest on the ground that by so doing he would be exceeding the limit mentioned in the mortgage deed. The maximum limit fixed in the documents could refer only to future advances and not to future interest on the amount so advanced. A mortgage has been defined in Section 58 (a) of the Transfer of Property Act as the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. In the latter part of Section 58 (a) of the Act, it is stated that the principal money and interest of which payment is secured for the time being are called the mortgage money. If a person takes a loan on the security of immovable property and the mortgage deed mentions, as it would naturally mention, the amount so lent as the amount secured by the mortgage, it could not be legitimately contended that the mortgagee cannot enforce the security for the accrued interest secured by the documents on the ground that it has been mentioned in the mortgage deed that it is executed for the amount advanced. In *Allahabad Bank Ltd. v. Benaras Bank Ltd.* (1938) 36 All. L.J. 658 the appellant-bank agreed to advance to the mortgagor a sum of Rs. 1,25,000 on the security of some properties and it was contended on behalf of the subsequent mortgagee, who filed the suit, that the appellant was entitled to priority u/s 79 of the Transfer of Property Act only to extent of Rs. 1,25,000, and not for the subsequent interest. But it has been held in that decision that the appellant as the first mortgagee is entitled to priority as against the second mortgagee not only with respect to the principal advanced under the first mortgage, but also with respect to the interest on that amount and that Section 79 of the Transfer of Property Act has no application in cases where no advance has been made by the prior mortgagee after the creation of the second mortgage. The principle of the decision shows that a mortgage deed providing the maximum limit of advances can be enforced not only for the amounts advanced upto the said maximum limit, but also for the amount due by way of interest.

4. The learned Second Additional Subordinate Judge has relied on the decision in K. Jagannatha Kone Vs. Ramachandra Naidu and Others, , in

support of his finding that the plaintiffs cannot claim a mortgage decree for the amount exceeding the maximum limit fixed in the security bonds. A

reading of the decision is sufficient to show that the principles enunciated therein can hardly be invoked to the suits on mortgages. It has been held

in that decision that where the property is given by a third party in security for the due performance of decree in particular amount, the effect of the

subsequent transfer of the property is that the decree-holder can enforce the security bond only to the extent of the amount secured thereunder by

the sale of the property specified therein and any sale for more than the amount specified in the bond will be without jurisdiction in the absence of

the transferee and will not bind him and such a sale can be set aside on the alienee depositing the amount due under the bond. The reasons for the

decision is obvious, namely, that the security bond was for a fixed sum, unlike the security bonds in this case, which secure interest on future

advances also. In fact, it is clear from Exhibit A-1 and A-2 that the documents commence with the statement that they are mortgage deeds for the

amounts of Rs. 5,000 and Rs. 10,000 respectively. In the body of the documents it is stated that the documents are intended to secure future

advances to the extent of Rs. 5,000 and Rs. 10,000 respectively. But it is also clear from the body of the documents that the plaintiffs could

recover the principal and interest on such advances on the security of the properties covered by Exhibits A-1 and A-2 and also by proceeding

against the other properties of the first defendant. In fact, in the above decision it is pointed out that it has now been well settled by the Privy

Council in Raj Ragubar Singh v. Jai Indra Bahadur Singh L R 46 I.A 128 : (1920) 38 M.L.J. 302 : ILR (1920) 42 All. 158, that a security bond

similar to the one in the suit given in favour of the Court does not constitute a mortgage within the meaning of the Transfer of Property Act so as to

attract the procedure laid down in that Act and the consequent necessity of a suit to enforce it. The learned Advocates for defendants 1 and 2 was

not able to advance any arguments to support the above decision of the learned Second Additional Subordinate Judge, which is obviously

incorrect. We find that the plaintiffs-appellants are entitled to enforce the claim for the amounts due to them under each of the bonds upto the

maximum limit mentioned in the documents so far as the principal is concerned and the interest on the said advances irrespective of the fact that the total amount of principal and interest is in excess of the maximum limits mentioned in the documents.

5. There is no registered document with regard to the alleged release of Item 3 of the plaint D Schedule. It is stated in the middle of paragraph 15

of the judgment of the lower Court that It was pointed out on behalf of the ""plaintiffs"" that a release can even be oral (evidently the word "plaintiffs"

is a mistake for the word defendants). In the grounds of appeal, the fourteenth ground is that that the learned Judge erred in thinking that, there

could be a valid release except by a registered instrument particularly when the properties involved were worth more than Rs. 100. A document of

release of any right or interest in immovable property of the value Rs. 100 or upwards, would require registration u/s 17 (1) (b) of the Registration

Act. The lower Court relied on the decision In Munuswami Mudaliar, Sellaperumal Mudaliar, B. Govinda Pillai and N. Ramanatha Aiyar Vs.

Govindaraja Chettiar and Another, , where it has been held that if there is a contract between a mortgagor and a mortgagee, it may be that u/s 92

(4) of the Evidence Act, it should be in writing and then it should also be registered under the Registration Act. But where the contract to release is

not between a mortgagor and a mortgagee, but between a mortgagee and a stranger who wants to purchase the property Included In the mortgage

neither the transfer of property Act nor the Evidence Act applies, that is there An may be an oral release of the property intended to be purchased

from the mortgagee, unreported judgment of Krishnan, J., in S.A. No. 797 of 1921, is referred to as laying down that there is no law In India

whereby a release of mortgage should be in writing, and registered. It is open to a mortgagee to give up some items of the hypotheca, but it would

not affect the rights of the purchaser of the other items of the hypotheca which are proceeded against to claim contribution from the person

interested in the said items which are so given up. It is clear from the decision itself that if there is a contract of release between the mortgagor and

the mortgagee, the document should be in writing by reason of Section 92 (4) of the Evidence Act and that it should also be registered under the

provisions of the Registration Act. It is, however, stated that where the contract to release is not between a mortgagor and a mortgagee, but

between a mortgagee and an intending purchaser, the release can be oral. In such a case it is not a release in respect of immovable property as the

person in whose favour the alleged document of release is executed had not, at that point of time any interest in the immovable property. The

decision in such a case could easily be supported on the ground that when a mortgagee receives money from the intending purchaser of a portion

of the hypotheca and orally gives up his security over the said property, he will be estopped from proceeding against that property. Sri K.

Sarvabhauman appearing for the third defendant relied on the said decision in support of his contention that there was such an agreement between

the plaintiff and P.W. 2 to release Item 3 of the plaintiff D Schedule prior to the date of sale, Exhibit A-32, in favour of P.W. 2. We shall therefore,

proceed to consider whether there was any such agreement in this case.

6. Item 3 of the plaintiff D Schedule is one of the items sold under Exhibit A-32 to P.W. 2, Manicka Chettiar, P.W. 1, Alangaram Chettiar who has

written several of the documents in this case, stated in his evidence that the plaintiffs agreed to release the items sold under Exhibit A-32 on

payment of a consideration of Rs. 3,000 by P.W. 2 to the plaintiffs. But it is clear from his evidence that only Rs. 2,500 was paid and so the

plaintiffs released other items but refused to release the house, item 3 of the plaintiff D Schedule. It is significant to note that the released deed Exhibit

A-42, dated 27th March, 1953, which is not a registered document, does not include Item 3 of the plaintiff D Schedule. It is true P.W. 2 Manicka

Chettiar admitted in cross-examination that he purchased the properties under Exhibit A-32 only on the understanding that the plaintiffs would

release them from the security bonds. But he stated in re-examination that in spite of the agreement, the house was not released because of the

subsequent proceedings. It is clear from his evidence that the plaintiff in O.S. No. 101 of 1951 on the file of the District Munsif Court, Kallakurichi

attached the said house property and brought it to sale in September, 1957 and one Velayudha Pillai as Court auction-purchaser took delivery of

the property through Court P.W. 2, Manicka Chettiar applied for re-delivery in the District Munsif Court, Kallakurichi, but his application was

dismissed on 18th July, 1958. It is from the said Velayudha Pillai the third defendant has purchased the house, item 3 of the plaintiff D Schedule.

There is really nothing In the documents filed in this case to show that Item 3 of the plaint D Schedule was also released as per the agreement

between the plaintiffs and P.W.2. Though Exhibit A-42 dated 27th March, 1953 Is not registered, the plaintiffs have excluded the Items mentioned

therein In asking for a mortgage decree. It is true the plaintiffs agreed to release item 3 of the plaint D Schedule also on payment of Rs. 3,000 by

P.W. 2, Manicka Chettiar, but as the said amount was not paid in full, item 3 of the plaint D Schedule was not released. It is likely that having

regard to the attachment and sale proceedings taken by the decree-holder in O.S. No. 101 of 1951 on the file of the District Munsif Court,

Kallakurichi, P.W. 2 was not evidently interested in getting item 3 of the plaint D Schedule released and the secured the release only In respect of

the other items covered by Exhibit A-42.

7. Sri K. Sarvabhauman appearing for the third defendant urged that as the third security bond Exhibit A-3 dated 6th April, 1961 came into

existence when the house property was under attachment before judgment made on 8th March, 1951, in O.S. No. 101 of 1951, District Munsif

Court, Kallackurichi, his rights as a transferee from the auction-purchaser would prevail over the mortgage on account of lis pendens and the

provisions contained in Section 64, Civil Procedure Code. But It is clear from the prayer in the plaint that in respect of the amount claimed under

the security bond Exhibit A-3, a mortgage decree is prayed for only against items 4 to 6 of the plaint D Schedule and not Item 3 of that schedule.

Hence, this objection cannot prevail and it was not pressed.

8. It is clear from a scrutiny of Exhibits A-1 and A-2 that item 3 of the plaint D Schedule has been included only in Exhibit A-2 and not in Exhibit

A-1. The lower Court should have passed separate mortgage decrees in respect of the claims under each of the documents, Exhibits A-1 and A-

2. The plaintiffs cannot enforce the security bond Exhibit A-1 against item 3 of the plaint D Schedule as It was not included in Exhibit A-1. We

direct the decree to be amended so that the plaintiffs would be entitled to proceed only against items 1 and 2 of the plaint D Schedule with regard

to the amount claimed under Exhibit A-1 and against Items 1 to 3 of the plaint D Schedule so far as the amount due under Exhibit A-2 is

concerned.

9. For the foregoing reasons the appeal Is allowed as prayed for, but subject to this modification, that there shall be separate mortgage decrees in respect of Exhibits A-1 and A-2 also. The appellants are entitled to cost of this appeal.