

(1910) 03 MAD CK 0041
In the Madras High Court

Muthia Raja

APPELLANT

Vs

Appala Raja minor by his next Friend, Mangammal and
Another

RESPONDENT

Date of Decision : 07-03-1910

Acts Referred:

Citation : (1910) 20 MLJ 393

Judgement

1. There is no ground for S.A. No. 411. It relates to the two-thirds share belonging to the plaintiff and his father. It must be dismissed with costs.

S.A. No. 412 relates to the one-third share in the suit properties which was originally the share of the 1st defendant. The mortgage by the 1st

defendant was before the partition. At the partition the whole of the suit properties fell to the plaintiff's share. It is not alleged that the partition was

otherwise than fair and equal. It was not in fraud of the mortgagee. The authorities are clear that a mortgagee of an undivided share in common

property or of one of the joint properties before partition from one of the sharers is only entitled to proceed against the substituted property which

falls to the share of the mortgagor at the partition unless the partition has been unfair or is in fraud of the mortgagee. The principle is well explained

in Domat's Civil Law, Section 1671. In Byjnath Lall v. Ramoodeen Chowdry (1874) I.L.A. 106 the Privy Council has adopted the same principle

though the partition in that case was made by the Revenue authorities under a Regulation and the Partition or Butwara proceedings had been

started at the date of the mortgage and the mortgagee could not be a party to the proceedings under the Regulation.

2. But the broad principle above referred to has been applied in numerous cases. See Hem Chunder Ghose v. Thakomoni Debi ILR (1893) C.

533. Amolakh Ram v. Chandan Singh ILR (1902) A. 483. Shahebzada Mahomed Kasim Shah v. R.S. Hills ILR (1907) C. 388 and Hakim Lal v.

Ram Lal (1907) 6 O. L.J. 46.

3. In the last case Mr. Justice Mookherjee has discussed and explained the rule at some length. We do not think that the decision in Lakshman v.

Gopal ILR (1898) B. 385 is opposed to it. In that case the partition was found to be in fraud of the mortgagee. It is pointed out by Mr. Justice

Ranade that the mortgagee should have been made a party to the partition suit according to the practice in Bombay. The partition was therefore

ordered to be reopened so as to assign to the mortgagor co-sharer the properties which had come to the plaintiffs at the partition. That decision

fully recognises the authority of the Calcutta cases. We must, therefore, hold that the Subordinate Judge was right in decreeing possession to the

plaintiff of the entire property.

4. We must dismiss the second appeal with costs.