
(1920) 03 MAD CK 0051
In the Madras High Court

Neelamani Patnaik Mussadi

APPELLANT

Vs

Sukaduva Behara and Others

RESPONDENT

Date of Decision : 24-03-1920

Acts Referred:

Registration Act, 1908 — Section 17(b)

Citation : (1920) ILR (Mad) 803 : 60 Ind. Cas. 255 : (1920) 12 LW 269

Hon'ble Judges : Spencer, J; Krishnan, J

Bench : Division Bench

Judgement

1. We must accept in second appeal the findings of fact of the learned District Judge that the mortgagors made the payment they pleaded to the mortgagee, and that they did so without notice of the prior assignment of the mortgage to the plaintiff. We think the learned Judge is right in holding that on the above findings plaintiff was bound by the payment so made.

2. The English Law on the point is quite clear, In Halsbury's Laws of England, Volume XXI, page 179, paragraph 334 it is stated that the mortgagor is entitled to make payments to the mortgagee, whether of principal or interest, and to have credit for them as against the transferee after the transfer until he has received notice of it. And several English cases, including Bickerton v. Walker (1900) 1 Ch. 736 and Dixon v. Winch (1885) 31 Ch. D. 151, are quoted.

3. There does not seem to be any good reason why that rule, which is founded on principles of equity, should not be followed in this country. It is true that, after the amendment of the definition of the term "actionable claim" by Act II of 1900 so as to exclude mortgage-debts, Section 130 of the Transfer of Property Act (Act IV of 1882) does not apply to mortgage-debts, and the statutory provision in it that the payment to a transferor will be valid against a transferee save when the debtor is a party to the transfer, or has received notice thereof does not apply to proprio vigore. But this rule itself is based on the equitable principle referred to and recognised in the English cases, and it subsists apart from the section itself. We think, therefore, the principle is applicable to payments by mortgagors

though the section does not.

4. It is true that notice is not necessary for the validity of the assignment of a mortgage. *Gobindrav v. Ravji* 12 B. 33 . But that is not the question before us. No doubt, where a mortgage is transferred without the privity of the mortgagor, the transferee takes subject to the state of account between mortgagor, and mortgagee at the date of the transfer" as observed by Cozens Hardy, J., in *Dixon v. Winch* (1885) 31 Ch. D. 151 above referred to. See *turner v. Smith* (1901) 1 Ch. 213 . But that observation also had no reference to the present question.

5. No Indian case has been cited to us on the exact question before us. But Dr. Ghose in his book of, the Law of Mortgages in India, Volume I, page 330, observes: "It is also well fettled that a payment made by the mortgagor to the mortgagee after, but without notice of, a transfer must, in the absence of collusion, be allowed to the mortgagor as against the transferee." We accept this as a correct statement of the law, so far as it goes.

6. It was then argued that the mortgagors were guilty of negligence as they did not make proper enquiries of the transferor about the absence of the mortgage deed from his possession. The learned Judge, however, finds that the mortgagors did make enquiries and they were given an explanation which they believed. We see no reason to suppose that the mortgagors anted negligently in these circumstances and no inference of constructive notice of plaintiff's assignment can be drawn against them.

7. The next question raised is, that the mortgagors can get credit only for what they actually paid though that payment was accepted by the mortgagee in full settlement of the debt due, and not for the whole mortgage-debt. As the mortgagors were entitled to deal with their mortgagee as if no assignment took place when they had no notice of the transfer, we think that the arrangement set up must be held to be binding on the transferee.

8. It is next argued that Exhibit I, which evidences the payment pleaded by the mortgagors, is inadmissible in evidence, as it is unregistered and as it purports, according to the plaintiff's Vakil, to extinguish the mortgage. On a reference to Exhibit I we find it to be merely a receipt for money actually paid, which was taken in full discharge of the mortgage debt, the payment of the balance of interest due being excused. There is nothing in the document to show that the mortgage-interest was expressly extinguished by it; it is only a discharge of a mortgage debt. We think there is a clear distinction between the discharge of a debt and the extinguishment of a mortgage-interest though one may be the result of the other. Where 8 receipt, in terms, only discharges the debt, it cannot be brought u/s 17(b) of the Registration Act (Act XVI of 1908). In this particular this case is distinguishable from the case of *Namagiri Lakshmi Ammal v. Srinivasa Aiyangar* 27 Ind. Cas. 269 , where there was an agreement to cancel and return the mortgage-deed. In *Mallappa v. Matam Nagu Chetty* 48 Ind. Cas 158 also cited, there was only an oral agreement to take a smaller sum for the

mortgage, amount and the question raised was quite different from the one before us. In the case of Chundooru Lakshmona Setty v. Duggisetty Chenchuramkayya 44 Ind. Cas. 132, also, the agreement was not merely to receive the Rs. 3,000 in full settlement but also to return the documents, that is, the mortgage-deed and the title-deeds. There was, therefore, in it a proposal to extinguish the mortgage interest.

9. All the points raised against the mortgagors, respondents Nos. 1 to 10, thus fail. It is finally urged that a decree for money should be given to the plaintiff against the representatives of the original mortgagee, who, is found to have received the mortgage-money from the mortgagors after the transfer to the plaintiff, as the money had and received for his use. In view of the findings come to by the learned District Judge, we think the question whether any relief, and, if so, what relief, should be given to the plaintiff against those representatives should have been considered. The fact that they were exonerated in the first Court, and that the plaintiff filed no appeal or memorandum of objections against such exoneration in the Appellate Court, will not stand in the way of plaintiff being given relief now under Order XLI, Rule 33, Civil Procedure Code, as there is no finding by the lower Appellate Court on the point, we must call for a finding on it and allow fresh evidence, as the point, though in a manner raised in Issue No. V, does not seem to have been properly tried. Finding in two months; objections, seven days.

FINDING.

10. In this appeal, I have been called upon by the High Court to receive fresh evidence and to submit a finding on the question whether plaintiff was entitled to any and what relief against the representatives of the deceased 12th defendant.

11. It was urged that the amount claimed from the legal representatives was in the nature of an Avvyavalarika debt, inasmuch as 12th defendant was guilty of fraud in reserving payment after assigning the mortgage-bond. The decision in Hanmant, Kashinath Joshi v. Ganesh Annaji 51 Ind. Cas. 612, is against any such contention. It was also attended that the claim was barred by limitation. But P.W. No. 1 has stated that he became aware of the receipt of the money by 12th defendant, only when the written Statements were filed.

12. My finding, therefore, is that the son of the deceased 12th defendant, viz., the 10th defendant in this case, would only be liable for Rs. 350 received by his father under Exhibit I, on 30th November 1911, and that the other legal representatives, defendants Nos. 15 to 18, are not liable.

13. This second appeal same as for final hearing after the return of the finding of the lower Appellate Court.

JUDGMENT.

14. As against the 19th defendant, the son of 12th defendant, the deceased assignor of the plaintiff the plaintiff's suit for money had and received is barred

under Article 62, Limitation Act Sriramulu v. Chinna Venkatasami 25 M.. 896. We do not pronounce on any other cause of action that the plaintiff may have against this defendant.

15. The second appeal is dismissed with costs of respondents Nos. 1 to 10.