

(1928) 07 MAD CK 0002
In the Madras High Court

N.S. Ramaswamy Mudaliar and Others	APPELLANT
Vs	
Gopalasubba Nayakan and Others	RESPONDENT

Date of Decision : 31-07-1928

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 145

Citation : 113 Ind. Cas. 666

Hon'ble Judges : Mackay, J;Devadoss, J

Bench : Division Bench

Judgement

1. This appeal is against the decree of the Subordinate Judge of Dindigul dismissing the plaintiffs' suit for recovery of principal and interest due on a mortgage-bond. The facts of the case are: The plaintiffs' father and the 4th defendant were the Karaswoms or stakeholders of a half yearly auction chit to which the 1st defendant was a subscriber. He bid for and obtained the chit in an auction and executed and registered a hypothecation bond on the 3rd February, 1906, for Rs. 2,000 as security for payment of future instalments. Defendants Nos. 1 and 2 are members of an undivided Hindu family. They executed a simple mortgage-deed in favour of the 3rd defendant for Rs. 4,000 on the 15th February, 1919. (Ex. 1). On the 1st February, 1913, defendants Nos. 1 and 2 executed three sale deeds in favour of third persons, Exs. B, C and D with the direction that the vendees should pay off the mortgage amount due to the plaintiffs and the amount due to the 3rd defendant. The vendees not having paid the amount due under Ex. I, the 3rd defendant brought O.S. No. 102 of 1916 on Ex. I impleading defendants Nos. 1 and 2 and the purchasers under Exs. B, C and D as defendants in the case. He did not implead the plaintiffs as defendants. A preliminary decree was passed on the 20th October,

1916, and a final decree was passed thereafter. Defendants Nos. 1 and 2 got releases from the vendees under Exs. B, C and D of their rights in

the property sold to them by Exs. G, G (1) and G (2) on 1st August, 1917, 4th October, 1917, and 26th November, 1917, respectively.

Defendants Nos. 1 and 2 conveyed all their properties which they purported to sell under Exs. B, C and D to the 1st plaintiff in discharge of the

mortgage-debt under Ex. A by two documents, Exs. H and H (1) for Rs. 7,500 and Rs. 5,000 respectively on the 9th October, 1917, and 5th

December, 1917, and gave the plaintiffs possession of the properties. The 3rd defendant brought the properties to sale in execution of his decree

in O.S. No. 102 of 1916, bought the property himself and obtained possession through Court. Owing to the obstruction of the plaintiffs to the

peaceful possession of 3rd defendant, proceedings were taken u/s 145 of the Criminal Procedure Code and the Magistrate upheld the possession

of the 3rd defendant whereupon the plaintiffs brought this suit on their hypothecation bond of 1906, Exhibit A; defendants Nos. 1 and 2 remained

ex parte and the 3rd defendant contested the suit on various grounds. The Subordinate Judge held that the vendee under Ex.C had undertaken to

discharge the amount due under Ex. A and as the plaintiffs have acquired the right of the vendee under Ex. C, they could not fall back upon their

original mortgage Ex. A and sue thereon. The contention of Mr. Bhashyam for the appellants is that the plaintiffs must be presumed to have kept

alive the mortgage under Ex. A when they purchased the property under Exs. H and H (1) and that they are entitled to sue on it. It is a question of

fact in each case whether a person who acquires an interest in Immovable property and discharges a prior encumbrance intends to keep alive that

encumbrance as a shield against a puisne encumbrancer. This principle was clearly enunciated by the Privy Council in Gokaldas Gopaldas v.

Rambaksh Seochand 10 C. 1035 : 11 I.A. 126 : 8 Ind. Jur. 396 : 4 Sar. P.C.J. 543. Their Lordships held that the principle enunciated in the well-

known case of Toulmin v. Steere (1817) 3 Mer. 210 : 36 E.R. 81 : 17 R.R. 67 was not applicable to India and observed at page 1016 Page of

10 C. [Ed.].

The obvious question to ask in the interest of justice, equity and good conscience is, what was the intention of the party paying off the charge? He

had a right to extinguish it and a right to keep it alive. What was his intention? If there is no express evidence of it, what intention should be

ascribed to him? The ordinary rule is that a man having a right to act in either of two ways, shall be assumed to have acted according to his interest.

2. This principle is embodied in Section 101 of the Transfer of Property Act which is in these terms:

Where the owner of a charge or other incumbrance on Immovable property is or becomes absolutely entitled to that property, the charge or

incumbrance shall be extinguished, unless he declares, by express words or necessary implication, that it shall continue to subsist or such

continuance would be for his benefit." The plaintiffs have acquired the absolute or full title to the property purchased by them and the question is

whether they by express words or by necessary implication declared their intention to keep the mortgage of 1906 alive or whether the keeping

alive of that mortgage would be for their benefit. It is not an absolute rule of presumption that whenever it would be for the benefit of a person to

acquire absolute title to property he keeps alive the charge or encumbrance on the property in his favour. All that can be said is that in the absence

of special circumstances to show the contrary, the presumption is that when a subsequent encumbrancer pays off a prior incumbrance with the

consideration money of his own incumbrance, he does so with the intention of keeping the prior incumbrance alive for his own benefit. Vide

Chidambara Nadan late a Minor but now declared a Major and Another Vs. Musuvati Muni Nagendrayyan and Others, . It is unnecessary to

consider in detail the cases in Gopal Chunder Sreemany v. Herembo Chunder Holdar 16 C. 523 Dinobundhu Shaw Chowdhry v. Jogmaya Dasi

29 C. 154 : 29 I.A. 9 : 6 C.W.N. 209 : 12 M.L.J. 73 : 4 Bom. L.R. 238 : 8 Sar. P.C.J. 217 (P.C.) and Ibrahim Sahib v. Armugathayee 16 Ind.

Cas. 877 : 38 M. 18 as these cases were decided upon the facts appearing in evidence in them. Where a person who was a mortgagee over

property becomes purchaser thereof he cannot ask for subrogation so far as his own mortgage is concerned. The principle of subrogation does not

apply to such a case. The case in Govindasawmi Thevan Vs. T.M. Doraisawmi Pillai and Others, which is relied upon by the lower Court does not

apply to the present case. There it was held that where a purchaser undertakes to pay off two prior encumbrances but discharges one only, he

cannot claim to stand in the shoes of the mortgagee whose mortgage amount he discharged. It was held that his right to use the prior mortgage as

shield is based on a presumed intention to keep alive the prior mortgage for his own benefit and such a presumption is rebutted when he

undertakes to discharge both the mortgages. In *Surjiram Marwari v. Barhamdeo Persad* 2 C.L.J. 288 it was similarly held "if a person purchases

property which is subject to two mortgages, and retains a portion of the purchase-money for payment to the mortgagees but pays the first of the

two in-cumbrancers and not the second, he cannot treat the first mortgage as kept alive to be used as a shield against the second, nor can he claim

to be subrogated to the position of a mortgagee whose debt he has satisfied." Some observations of Mookerjee, J., in that judgment are relied

upon by the contesting respondents as supporting their case that the plaintiff did not intend to keep alive their mortgage of 1806 when they

purchased the property. In *Renga Srinivasachari v. Gnanaprakasa Mudaliar* 30 M. 67 : 2 M.L.T. 36 it was held that "where a person paying off a

prior mortgage, purchases a portion of the mortgaged properties in consideration of the amount so paid by him, the lien acquired by such payment

is extinguished and cannot be used by such purchaser as a shield against a subsequent mortgagee." *Ayling and Oldfield, JJ.*, make the following

observation with regard to the cases in *Renga Srinivasachari v. Gnanaprakasa Mudalair* 30 M. 67 : 2 M.L.T. 36 and *Govindasawmi Thevan Vs.*

T.M. Doraisawmi Pillai and Others, in Subramania Pillai v. Palaniappa Mudali 21 Ind. Cas. 978 : 26 M.L.J. 94 : 14 M.L.T. 585: "The cases are

simply authority for holding that, where a person who has actually acquired the equity of redemption pays off a prior mortgage, he cannot claim the

right of subrogation in respect of that mortgage as against a puisne mortgagee. Such a person does not really come within the scope of the Privy

Council ruling in *Gokaldas's case* 10 C. 1035 : 11 I.A. 126 : 8 Ind. Jur. 396 : 4 Sar. P.C.J. 543. Any doubt as to his intention is cleared up by

Section 101 of the Transfer of Property Act. Unless he declares his intention to keep the mortgage alive, it becomes extinguished by the mere fact

of discharge.

3. In Ex. H dated 9th October, 1917, the recital is "the sum of rupees seven thousand and five hundred aforesaid has been paid to us by way of

our endorsing payment this date on your hypothecation bond aforesaid."" In Ex. I which is a later document executed on the 5th December, 1917,

there is a clear expression as to the intention of the parties: ""The said sum of Rs. 5,000 has been paid and endorsement of payment has been made

on the said hypothecation bond and the whole bond has been discharged. As we have received money in this manner you are to hold and enjoy

the undermentioned property with all rights and privileges etc."" The circumstances under which both Exs. H and H (1) came to be executed also

have to be considered in this connection. The 3rd defendant had obtained a final decree in O.S. No. 102 of 1916. He was about to bring the

property to sale. Defendants Nos. 1 and 2 who were in possession of the property could not resist the execution of the decree in O.S. No. 102 of

1916. They attempted by sales under Exs. B and D to discharge the debt due to the 3rd defendant. The vendees under Exs. B and D did not

discharge the debt. The plaintiffs either to assist defendants Nos. 1 and 2 in fighting the 3rd defendant or for their own purposes, wanted to take

possession of the property and accordingly Exs. G and G (1) and G (2) were brought into existence and sales were effected by Exs. H and H (1)

and, as observed by the Vakil for the respondents, five documents were brought into existence within the space of four months. The vendees under

Exs. B, C and D were evidently tools in the hands either of the plaintiffs or of defendants Nos. 1 and 2. If the plaintiffs wanted to enforce their right

under the mortgage of 1906, Ex. A, they could have brought a suit against defendants Nos. 1 to 3 and recovered the amount by sale of the

hypotheca. In Exs. H and H (1) there was no present advance. The only consideration for the sale was the previous mortgage in favour of the

plaintiffs. Probably, the plaintiffs thought that if that mortgage was left outstanding, it might be said that there was no consideration for the sale. That

is why they distinctly stated in Ex. H (1) that the whole bond had been discharged. When there is an express recital to that effect, there must be

very strong and cogent evidence to show that the plaintiffs wanted to keep alive their mortgage of 1906. What is strongly urged by Mr. Bhashyam

Ayyangar is that, if it was for the plaintiffs' benefit to keep alive the mortgage, they must be deemed to have kept it alive. As already observed,

there is no absolute rule of law that such a presumption should be made in all cases. Taking all the circumstances of this case into consideration, we

have no hesitation in holding that at the time when Exs. H and H(1) were executed the intention of the parties was that the sale was to be in satisfaction of the amount due on the mortgage and it was not the plaintiffs' intention to keep alive the mortgage of 1906 after the dates of Exs H and H (1).

4. The presumption that is embodied in Section 101 is an equitable presumption and a person is not entitled to have the benefit of the presumption

if his conduct has not been above board. The Court is not bound to raise that presumption where the circumstances under which the transaction

took place are, if not fraudulent, of a very suspicious character.

5. The Subordinate Judge has found that it has not been proved that the debt under Ex. A had been discharged. Though there is no direct evidence

of discharge, yet in the circumstances of the case, one cannot resist the impression that Ex. A must have been discharged in the usual course by

payment of the chit-instalments. Exhibit A was executed as already observed as security for payment of future instalments. The chit transaction

came to an end in 1911. In 1912, Ex. J a notice was sent by a Vakil on behalf of the plaintiffs to the 1st defendant demanding the recovery of Rs.

2,000 and interest. There is no mention in it of the amount of interest. The plaintiffs have not produced the account book of the chit transaction and

the 1st plaintiff says that he did not keep an account. Exhibit M a note book is produced which gives the names of the persons who bid at the

auction and the names of the subscribers. The defaulter's names are marked with a cross. The amount of subscription in default is not shown. We

cannot place any reliance on Ex. M as proving that defendants Nos. 1 and 2 were defaulters. No doubt, the onus is upon the defendants to prove

discharge but the following circumstances lend colour to the contention of the 3rd defendant that there was nothing due under Ex. A after 1911.

Ex. 1 the mortgage to the 3rd defendant was attested by the 4th defendant who was one of the Karaswoms of the chit, and the recital in Ex. 1 is

we have not subjected the aforesaid lands to any other encumbrances." Though mere attestation is no sufficient notice of the contents of a

document, yet knowing the customs and habits of the people we may safely conclude that the object of obtaining the attestation of the 4th

defendant was to show that there was no default in payment of the subscriptions

to the chit and, therefore, no amount was due under Ex. A on account of the default of defendants Nos. 1 and 2 in paying their subscriptions regularly. The 1st plaintiff in his deposition says that he was not aware of the existence of Ex. 1 till disputes arose as regards possession of the property. This is manifestly false, for in 1917 when Exs. H & H (1) were executed in his favour he obtained Exs. B, C and D. He must have known that the 3rd defendant's mortgage was outstanding. Though notice was sent in 1912 demanding Rs. 2,000 yet no suit was brought on Ex. A for nine years. The suggestion that the 4th defendant was quarrelling with the plaintiffs is not sufficient explanation for not bringing a suit. The conduct of defendants Nos. 1 and 2 in executing three documents, Exs. B, C and D in 1915 and getting releases without any consideration under Exs. G, G (1), G (2) and conveying the properties to the plaintiffs, shows that all these transactions were collusive and intended to defeat the 3rd defendant of his legitimate claim. The 1st defendant has not gone into the box to support the claim of the plaintiffs, nor has any of the vendees under Exs. B, C and D been examined in the case. Though a positive finding cannot be given in favour of the 3rd defendant that Ex. A was discharged by the regular payment of subscriptions yet the circumstances and the conduct of the parties lends one to entertain very serious doubts as to any amount outstanding on Ex A. The plaintiffs must have known that they were getting sale-deeds in consideration of a mortgage more than eleven years old and that it would not be easy to sustain a suit on it as against the 3rd defendant and, therefore, they wanted the sale to be in full discharge of the mortgage.

6. The respondent's Vakil raises the question of limitation. Exhibit A provides for the whole of the amount becoming due on default being made in the payment of subscriptions, but the plaintiffs were not bound to take advantage of that provision and they are entitled to sue within 12 years of the close of the chit. The termination of the chit transaction was in 1911 and this suit was brought on the 25th December, 1921. The suit is, therefore, within time.

7. In the result the appeal fails and is dismissed with costs of 12th respondent.