

(1934) 05 MAD CK 0033
In the Madras High Court

(Palavalasa) Suramma Nayuralu

APPELLANT

Vs

(Savirigana) Surayya and Others

RESPONDENT

Date of Decision : 03-05-1934

Acts Referred:

Citation : AIR 1934 Mad 585 : 152 Ind. Cas. 612 : (1934) 40 LW 440

Hon'ble Judges : Venkatasubba Rao, J

Bench : Division Bench

Judgement

Venkatasubba Rao, J.—This appeal raises the vexed question of priority in regard to the right to possession, when the competing claimants

are purchasers at execution sales under different mortgage decrees against the same mortgagor. The facts in their chronological order may be

briefly set out:

24-1-1920 Defendants 1 and 2 executed a promissory note in favour of defendant 6.

9-5-1922 The same persona executed a mortgage to defendants 3 to 5, Exact date Subsequent to that mortgage, not known. defendant 6 filed O.S. No.724 of 1922 against defendants 1 and 2 to enforce his right under the promissory note.

24-11-1923 Defendant 6 obtained a consent

decree in O.S. No, 724 of
1922 which by Its terms
created a mortgage
(not a mere charge) in
his favour, over the
properties already
mortgaged to defendants 3 to 5.

23-4-1924 Defendants 3 to 5 instituted
O.S. No. 303 of 1924
against defendants 1 and 2
to enforce their mortgage
(without impleading defendant 6).

8-10-1924 Defendant 6 in execution of his
decree in O.S. No. 724 of 1922
brought the properties to sale.
(Defendants 3 to 5 were
not parties to this proceeding).

20-11-1924 Defendant 6, having himself
purchased the property, obtained
delivery.

24-11-1924 A mortgage was passed in O.S. No.
303 of 1924.

19-1-1925 Defendant 6 sold the properties
to the plaintiff.

24-12-1926 Defendants 3 to 5, having purchased
the properties in execution of
their mortgaged decree,
obtained symbolical delivery.

2. I find no difficulty in holding that the position of defendant 6 is that of a
puisne mortgagee and I am further prepared to hold that his execution

petition must for the present purpose be treated as a suit to enforce his mortgage. That being so, the; salient facts are these : (1) The suit by the first mortgagees was earlier in date. (2) The earlier purchase was that made in the suit of the puisne mortgagee. (3) That purchase was made during the pendency of the first mortgagees' action. The contest is between the plaintiff, who traces his right to the earlier sale in the later suit (by the puisne mortgagee) and defendants 3 to 5, who claim under the later purchase in the earlier action (by the prior mortgagees). The plaintiff was in possession on the date of the suit, and the learned District Munsif, holding that he was entitled to remain in possession, has granted an injunction restraining defendant 3 to 5 from interfering with the plaintiff's possession. That decree of the trial Court has been reversed by the Subordinate Judge, but in my opinion the District Munsif's view is correct and that of the lower appellate Court is wrong.

3. Where each of several simple mortgagees files a separate suit, impleading his mortgagor alone and not other mortgagees, and in execution sales different persons become purchasers, it must now be taken as settled, that priority of date of purchase gives priority of title to possession; the fact that a particular mortgage was earlier in date or that a particular suit was filed earlier, being immaterial. Such conflict as there was on the point, must now be taken to have been set at rest by the recent decision of the Full Bench in *Nagendraa Chettiar v. Lakshmi Ammal* 1933 Mad. 583.

This rule, I think, rests on sound principle. The mortgages being simple, possession remains with the mortgagor and he is the person in law entitled to it. It follows therefore that a sale of his interest in a suit either by a prior or a puisne mortgagee must convey to the purchaser the mortgagor's right to possession, the only question being in which suit was the earlier sale made. On the date of that sale the mortgagor having the right to possession, that right becomes transferred to the vendee. The plaintiff on the facts stated above must therefore be held to have a preferential right to possession. The question next arises, is that right affected by the doctrine of *lis pendens*, as the purchase under which the claim, was made during the pendency of the suit brought by the prior mortgagees? I think not. The rights of the second mortgagee are unaffected by the first mortgagees' suit his right to redeem the prior mortgage remains, so also is his right to sell the equity of redemption preserved. The argument was at

one time put forward that the subsequent mortgagee could only claim to redeem the prior mortgage and only after such redemption, could sue for

sale, but the Courts have repelled this contention : Mulla Vittil Seethi v. Achuthan Nair (1911) 9 I.C. 513 and Chinnu Pillai v. Venkatasamy

Chettiat 1917 Mad. 751. I may quote the following passage from the judgment in the first mentioned case:

These observations are not confined to the mere preservation of the subsequent mortgagee's right to redeem the previous mortgage. If the rights of

the puisne encumbrancer, who was not made a party to the suit of the prior mortgagee, are preserved in every respect the right to sue for the sale

of the equity of redemption, which existed previous to the suit by the first mortgagee, must continue to remain after it.

4. If, notwithstanding the pendency of the prior mortgage's suit, the decisions have held that the puisne mortgagee's right to sue for sale is

preserved intact, the conclusion, I think, is inevitable that the transfer resulting from such a sale cannot be affected by the rule of lis pendens. There

is yet another reason for holding that the prior mortgagees' action does not operate as a lis pendens. The principle of lis pendens is based on "the

maxim ut lite pendente nihil innovatur, which means, "during a litigation nothing new should be introduced." In the words of the Lord Chancellor in

Bellamy v. Sabine 1 De G & J 566:

The law does not allow litigant parties to give to others pending the litigation rights to the property in dispute, so as to prejudice the opposite party.

5. "The necessities of mankind" continues the Lord Chancellor:

require that the decision of the Court in the suit shall be binding; not only on the litigant parties, but also on those who derive title under them by

alienations made pending the suit.

6. The reason for the doctrine is that tout for it, "interminable litigation might toe the consequence." The alienations aimed against by the rule (as the

passages extracted above show) are those made during the pendency of the suit and not those which have been effected .previously. If a certain

right remains unaffected, the legal remedy to enforce that right must also continue. No suit "therefore can operate as a lis pendens so as to affect

the antecedent transfers which had come into existence prior to it; the transfers being unaffected, it follows that the legal proceedings brought to

enforce those transfers are likewise immune from the operation of the rule. This is in conformity with the decision of Krishnan Pandalai, J., in

Chinnaswami Padayachi v. Darmalinga Paiayachi 1982 Mad. 566.

7. I therefore hold that the District Munsif's view that the plaintiff has a preferential right to possession, is correct. It must be noted that the findings

of the trial Court on issues 1 and 2 are binding upon him. Those findings are, (1) that the mortgage in favour of defendants 3 to 5 is not nominal and

(2) that the decree in O.S. No. 303 of 1924 is not vitiated by fraud or collusion. AH that is now decided is that the plaintiff has a prior right to

possession. The other rights which the parties possess, must be worked out in appropriate proceedings. In the result, the decree of the

Subordinate Judge is set aside and that of the District Munsif is restored. But the plaintiff shall not get his costs in this and the lower appellate

Court some of the issues having been decided against him.