

(1961) 01 KL CK 0002
In the High Court Of Kerala
Case No : B.C.S. No. 9 of 1958

Popular Bank Ltd.

APPELLANT

Vs

The United Coir Factories and Others

RESPONDENT

Date of Decision : 30-01-1961

Acts Referred:

Transfer of Property Act, 1882 — Section 107, 54, 58(f), 59, 62

Citation : (1961) KLJ 799

Hon'ble Judges : P.T. Raman Nayar, J

Bench : Single Bench

Advocate : C.S. Ananthakrishna Iyer, for the Appellant; K.N. Narayananan Nair For 2nd Defendant, K.C. John For 3rd Defendant and M. Ramanatha Pillai For 4th Defendant, for the Respondent

Judgement

Mr. Justice P.T. Raman Nayar, J.—This suit by a banking company in liquidation for the recovery of an amount of Rs. 58, 610.52 due from the 1st defendant by way of overdraft guaranteed by his wife the 2nd defendant, and secured by the latter by a mortgage, by deposit of title deeds, of the properties described in the schedule to the plaint. The guarantee bond, limited to the sum of Rs. 35, 000 and interest thereon was executed by the 2nd defendant on 26th November 1953, and the mortgage by deposit of title deeds was on the same day, a memorandum to evidence it being executed the following day. On 14th May 1958, defendants 1 and 2 and their daughter the 4th defendant (who according to the plaintiff has no rights whatsoever in the properties) executed a simple mortgage in favor of the 3rd defendant bank. This was after the filing of the suit on 31st March 1958 and defendants 3 and 4 were impleaded on application by the plaintiff, the plaint being amended as a consequence, and the reason for their being made parties is thus stated in paragraph 7(c).

Defendants 3 and 4 are impleaded to avoid multiplicity of proceedings and in order to make this decree binding upon them also and so as to enable the plaintiff bank to obtain a decree for sale of all the rights of the defendants in the

properties.

(One is provoked to remark that Section 62 of the Transfer of Property Act would have seen to this so far as the 3rd defendant bank was concerned, except in so far as it claims under the 4th defendant and that in bringing the 3rd defendant bank on the party array and giving it an opportunity to contest its claim, the plaintiff bank has been more than fair). The 1st defendant entered appearance through counsel but did not file any written statement. Subsequently his counsel reported no instructions and, the 1st defendant not appearing, the trial proceeded ex parte so far as he was concerned.

2. The 2nd defendant filed a written statement denying the alleged guarantee and the alleged mortgage and protesting ignorance of her husband's alleged indebtedness to the plaintiff bank. The contents of the plaint came to her as a great surprise and, if any of her title deeds have come into the hands of the plaintiff bank, it must be the mischief of the 1st defendant in whose house she is living and where her title deeds were kept. The suit is in any event, barred by limitation.

3. The 4th defendant denies knowledge of the alleged mortgage and claims that item 3 of the plaint schedule which item originally belonged to the 1st defendant, was gifted by him to herself and her mother, the 2nd defendant in 1112 M. E. (1936-37), long before the alleged mortgage, and that by reason of this gift she (the 4th defendant) is the owner of one half of this item, the 2nd defendant and her nine children (including the 4th defendant) being jointly entitled to the other half, The suit is bad for non-joinder of the remaining children of the 2nd defendant.

4. The 3rd defendant denies the plaint mortgage and, in particular, avers that there was no deposit with the plaintiff bank of the title deeds of items 8 and 9 of the plaint. The 2nd and 4th defendants were joint owners of items 3 and 4 by reason of the gift of 1112 M. E. (1936-37) and, in any case, the alleged mortgage to the plaintiff by the 2nd defendant could not cover the 4th defendant's half share in these items. Defendants 1, 2 and 4 have jointly executed a mortgage deed for Rs. 40, 000 on 14-5-1958 in favor of the 3rd defendant and by reason of the plaintiff's gross negligence in the matter, as also by reason of the decree obtained by the 3rd defendant against defendants 1 and 2 in O. S. 53 of 1950 of the Alleppey District Court, the 3rd defendant's mortgage is entitled to priority.

5. The following issues were framed:

1. Whether the equitable mortgage set up in the plaint is true and valid?
2. Whether the alleged deed of indemnity by the 2nd defendant is true and valid?
3. What is the amount due to the plaintiff bank?
4. Whether the claim of the bank is in time?

5. Whether there has been a deposit of the title deeds of items 8 and 9 of the plaint schedule with the plaintiff bank?
6. Whether the 3rd defendant bank is entitled to claim any priority in respect of any of the items included in the plaint for the amounts due to it?
7. Whether the 4th defendant has any right to any of the plaint properties?
8. What is the amount due to the 3rd defendant bank?
9. What reliefs are the parties entitled to?
10. What is the proper order as to costs?

Additional Issues:

1. What interest, if any, has the 4th defendant in item No. 3 of the plaint properties?

2. Is the suit mortgage binding on the 4th defendant's interest?

6. Issue 7 and Additional Issues 1 and 2 - The 4th defendant's claim and it in so far as it claims under the mortgage in its favor by the 4th defendant, the claim by the 3rd defendant bank, are of paramount title, the gift deed, Ext. P. 5(t), by the 1st defendant in favor of defendants 2 and 4 (and another) being in 1112 M. E. (1936-37), long before the suit mortgage. It is clear from the case put forward by the 4th defendant that there are others who are not parties to the suit (and whom the 4th defendant does not represent) who may have claims against the property under the gift deed and, that being so, it would be pointless to go into the question of paramount title here. Since that question is not being considered, the 4th defendant, and the others who according to her should have been made parties to the suit, are unnecessary parties. The question of paramount title based on Ext. P. 5 (t) will not be considered in this suit and the 4th defendant will be struck off the party array.

7. I might add that the claim of the 3rd defendant bank in respect of item 4 as a mortgagee under the 4th defendant proceeds on the misconception that Ext. P. 5 (t) covers both items 3 and 4. In fact it covers only item 3, and it is conceded that the 3rd defendant's claim of paramount title under the 4th defendant can relate only to this item. For the rest, the 3rd defendant bank's claim is under the 2nd defendant (the 1st defendant having admittedly no title to the properties) and its mortgage, Ext. D1, dated 14th May 1958, is long subsequent to the suit mortgage.

8. Issues 1 and 2-P. W. 1, who was the manager of the plaintiff bank at the time, has given evidence to the effect that in 1953 the 1st defendant had a big unsecured overdraft with the bank, that the properties of the 1st defendant stood in the name of his wife, the 2nd defendant, and that P.W. 1 was therefore pressing the 1st defendant for some security in the shape of a guarantee from the 2nd defendant and a mortgage over her properties. The 1st defendant

agreed, and on 26th November 1953, he took P. W. 1 (who was accompanied by the plaintiff bank's accountant one Ramachandra Pai) to his house, and there the 2nd defendant executed the guarantee bond, Ext. P. 4, in the bank's printed form, guaranteeing the repayment of any advances made to the 1st defendant up to a limit of Rs. 35, 000. P. W. 1 read out Ext. P. 4 to the 2nd defendant and explained its contents to her, and she signed it in his presence (and in the presence of Ramachandra Pai, who is an attester) with full knowledge and consent. P. W. 1 also demanded security for the 1st defendant's overdraft, and the 2nd defendant handed over to him the title deeds, Exts. P. 5 series agreeing that the properties covered by those deeds should be security. It was arranged that the 2nd defendant should go to the bank's office the next day and execute a memorandum to evidence the deposit of the title deeds. Accordingly, she went to the bank the following day accompanied by the 1st defendant and there, in the presence of P. W. 1, executed the memorandum, Ext. P. 6, which P.W. 1 had meanwhile got prepared.

9. The 2nd defendant as D. W. 1 has denied all this and denied her signatures in Exts. P. 4 and P. 6. The, signatures in Exts. P. 4 and P. 6 are in English and it is her evidence that she never signs her name in English, but signs it only in Malayalam the initial, "K" alone being written in English. But the registered documents, Ext. D1 and Ext. P. 5 (s) bear the 2nd defendant's signature in English just as in Exts. P. 4 and P. 5, and those signatures compare very favorably with the disputed signatures. The 2nd defendant in her evidence went so far as to deny even her signatures in the registered documents, but that those signatures are hers is not disputed. It is also to be remembered that, according to the 2nd defendant herself, Ext. P. 4 bears the attestation of her husband the 1st defendant.

10. But what really concludes the matter in favor of the plaintiff and gives the lie to the 2nd defendant's denial, is that the plaintiff has been able to produce the title deeds, Ext. P. 5 series, which are enumerated in the memorandum, Ext. P. 6, and which are admittedly the title deeds of the 2nd defendant. This circumstance lends material support to the evidence of P. W. 1 and unless the 2nd defendant is able to say how her title deeds got into the hands of the plaintiff bank otherwise than as spoken to by P. W. 1, it follows that P. W. 1's evidence has to be accepted. The suggestion, both in the 2nd defendant's written statement and in her evidence is that her husband, the 1st defendant, must have surreptitiously removed the documents and handed them over to the plaintiff bank. That he should have so connived at deceiving his wife does not seem very likely. But, that apart, it is apparent that the 2nd defendant's case that she was unaware of the loss of her title deeds until she was served with a copy of the plaint, is false. In chief examination she said that it was on reading the copy of the plaint served upon her that she learned for the first time that the documents were with the plaintiff bank. She then searched the box in which her documents as well as the 1st defendant's documents are usually kept (and the key of which is kept at a place accessible to both) and then discovered that her documents were missing.

In cross-examination her case was different. It was that, when she came back to her husband's house after confinement in 1953 or so, she noticed that her documents were not in the box. She asked her husband about them and he told her that he had kept them safe in his desk. She believed him and made no further enquiry until she got summons in the present case. Then she searched the 1st defendant's desk and finding that the documents were not there, she asked him about them whereupon he told her that he had given them to the bank. For what purpose he did not choose to state. Neither did she ask him nor did she issue any notice to the plaintiff bank to the effect that the documents had reached it without her knowledge or consent.

11. All this is scarcely credible and what proves that the several inconsistent versions given by the 2nd defendant are all untrue is the fact that in Ext. D1, the mortgage executed by defendants 1, 2 and 4 in favor of the 3rd defendant bank on 14th May 1958, six weeks after the institution of the present suit (although before service of summons on defendants 1 and 2) there is the recital that the documents of title (apart from the eight documents which have been marked as Ext. D2 series and relate to items 8 and 9 of the suit properties, which documents were handed over to the 3rd defendant bank) were missing. And the evidence of D. W. 2, who took the mortgage on behalf of the 3rd defendant bank is that the mortgagors told him that the title deeds had been lost. Therefore, as late as 14th May 1958, the 2nd defendant's case was that her documents had been lost, a case to which the 1st defendant and the 4th defendant also subscribed and her present case that they were surreptitiously handed over by the 1st defendant to the bank in 1953 or thereabouts is entitled to no credence.

12. I accept the evidence of P. W. 1 and, nothing having been said against the validity of the mortgage or the deed of indemnity, I answer issues 1 and 2 in the affirmative.

13. I might here mention that items 2 and 7 of the plaint have been included in the suit by mistake. No documents in respect of these items have been produced and it is admitted that these items did not belong to the 2nd defendant and were not mortgaged by her to the plaintiff. In fact these items belong to the vendors of items 1 and 6 respectively to the 2nd defendant and are included in sale deeds Ext. P. 5(u) and Ext. P. 5(q) only as indemnity of their title to items 1 and 6.

14. I might also remark that it is quite clear from Exts. P. 4 and P. 6 that the mortgage evidenced by the latter document was to secure the 1st defendant's liability to the plaintiff bank, and not to secure the 2nd defendant's liability as surety under the former document. Ext. P. 6 states so and clause (g) of Ext. P. 4 says the guarantee given thereunder is in addition to any security the bank might hold. P. W. 1's evidence is also to the same effect.

15. Issue 3-The evidence of P. W. 1 supported by the entries in the current account ledgers, Exts. P. 1 and P. 2, (Ext. P. 1 (a) being the 1st defendant's No. 1 account and Ext. P. 2 (a) his No. 2 account) and the confirmations Exts. P. 3

and P. 8 respectively by the 1st defendant in respect of the two accounts, prove that the amount due from the 1st defendant on his No. 1 account was Rs. 52, 233 and on his No. 2 account Rs. 6, 377.20 as on the date of the plaint. Clause (h) of the guarantee bond, Ext. P. 4 executed by the 2nd defendant states that any account settled or stated by the principal (i.e. by the 1st defendant) shall be accepted by her as conclusive evidence that the balance stated therein is due from the principal to the bank. The 2nd defendant is therefore bound by the confirmations made by the 1st defendant. There is no evidence to the contrary and I find that the sum claimed in the plaint is correct.

16. Issue 4-Account No. 1 was opened in 1949 and account No. 2 in 1954. The winding up petition was presented on 27th August 1956 and, by reason of Section 45 O of the Banking Companies Act, time ceased to run from that date. There can therefore be no question of any bar of time so far as account No. 2 is concerned.

17. With regard to account No. 1, the evidence of P. W. 1 is that, in accordance with the usual banking practice, confirmation letters were being obtained from the 1st defendant regarding the debit balance in his account as at the end of each quarter. Ext. P. 3 and Exts. P. 7 to P. 7(t) are some of these confirmation letters, and they have been proved by P. W. 1 who knows the signature of the 1st defendant. (He cannot say at this distance of time whether any of them was signed in his presence. The usual practice however is to send confirmation letters to the constituents for signature). There is no evidence to the contrary and therefore it must be taken as proved that Exts. P. 3 and P. 7 series have all been signed by the 1st defendant.

18. Ext. P. 7 bears the date 5th July 1949 and Ext. P. 3 the date 18th April 1956. In between come Exts. P. 7(a) to P. 7(t) at more or less quarterly intervals and, although the confirmations for some quarters are missing, there is more than one for each year. The confirmation letters which are in a printed form are in similar terms and it is enough to reproduce one of them. Ext. P. 3 dated 18th April 1956 runs thus:

To

Popular Bank, Limited, Alleppey.

Dear Sirs,

I have received your letter of 31st March 1956 and hereby acknowledge the correctness of the balance of Rs. 42, 203-12-3 (Rupees Forty two-thousand two hundred and three, annas twelve and pies three only) standing to my Debit on that date.

There can be little doubt that this is an acknowledgment of liability within the meaning of Section 19 of the Limitation Act and, there being such acknowledgments more than once a year from the opening of the account up to the presentation of the winding up petition, it follows that the claim under No. 1

account as well is in time. What was held in *Nagappa Chetti v. V. A. A. R. Firm* (A. I. R. 1925 Mad. 1215) which has been cited on behalf of the defendants, was that a confirmation letter similar to those we are now considering was not an acknowledgment within the meaning of article 1 of the First Schedule of the Stamp Act and therefore did not require to be stamped. Far from holding that the letter of confirmation was not an acknowledgment within the meaning of Section 19 of the Limitation Act, the very basis of the decision is that it is, for, it is on the strength of that letter that the claim was held to be in time. In fact it was not there disputed that the letter was an acknowledgment which would save time. All this is clear from a perusal of the judgment in the case, especially the judgment of Krishnan J. Of course, head note (b) of the report which runs:

Limitation Act, Section 19-Letter stating that accounts stated by creditor are correct is not acknowledgment.

is wrong. This illustrates the danger of citing a case after reading only the head note.

19. The claims being alive as against the 1st defendant, it seems to me from the terms of the guarantee bond, Ext. P. 4, that they are alive so far as the 2nd defendant's guarantee also is concerned. For, Ext. P. 4 is in very wide terms. Clause (b) shows that it is a continuing guarantee determinable only after three months" notice-there is no case that it has been so determined-and clause (c) states that the guarantee shall be applicable to the ultimate general balance that may become due from the principal, the term, "General balance" being defined in the opening sentence of Ext. P. 4 as inclusive of all sums of money which may then or at any time be owing to the bank from the principal. It seems clear that in respect of any debt incurred by the principal during the currency of the guarantee, the surety is liable so long as the debt is recoverable from principal. It does not matter that the principal has kept the debt alive by acknowledgments u/s 19 of the Limitation Act or by payments u/s 20, for, by these acts, there is no renewal of the debt, and no new debt created which is not covered by the guarantee. The debt remains the same, namely, the debt guaranteed; only the bar of time against recovery is postponed. Section 21 (2) of the Limitation Act has no bearing, for, a mere surety is not a joint contractor. His is a separate and collateral contract for the purpose of ensuring that the principal keeps his contract. With great respect I prefer to follow the decision in *Gana Nath Sen v. Ranjith Ray* (I. L. R. 1942 (1) Cal. 11), to those in *Brajendra Kishore Roy Chowdhury v. Hindustan Co-operative Insurance Society Ltd.* (I. L. R. 44 Cal. 978), *Suwalal v. Fazle Hussain* (A. I. R. 1939 Nag. 31) and *Ayyvaayan v. Sankaralingom Iyen* (24 T. L. J. I).

20. I might also mention that the guarantee bond Ext. P. 4 was executed on 26th November 1953 in respect of the debts then existing and thereafter to be incurred. The debt then existing was that under account No. 1 and, by reason of the several acknowledgments from the time of the opening of the account in 1949 (the latest of them being Ext. P. 7 (k), dated 9th October 1953) that debt

was alive on the date of Ext. P. 4. The debt thereafter incurred was under account No. 2 which was opened in 1954. The presentation of the winding up petition was on 27th August 1956 within three years of Ext. P. 4, so that, in any view of the matter, there can be no question of the guarantee being barred by time.

21. As the memorandum Ext. P. 6 shows, the mortgage by deposit of title deeds was as security for all debts already incurred by the 1st defendant or thereafter to be incurred, and, personal recovery from the 1st defendant being in time, there can be no question of the mortgage being barred by time.

22. I find that the suit is in time.

23. Issue 5.-The deeds by which the 2nd defendant acquired items 8 and 9 are Exts. D2 and D2 (a) respectively. These were handed over to the 3rd defendant bank on the execution of the mortgage, Ext. D1, and have been produced by the 3rd defendant. They were never deposited with the plaintiff bank and, among the deeds, Ext. P. 5 series, deposited with the plaintiff bank, the only deeds appertaining to these items of property are Exts. P. 5 (h), P. 5(w), P. 5 (j) P. 5(x) and P. 5(k) to P. 5(p). Exts. P. 5(h), P. 5(w) and P. 5(j) relate to some prior transactions between the predecessors of the 2nd defendant in respect of 22? cents out of the 66? cents comprised in item No. 8 while Ext. P. 5(x) is only a rent deed executed by some of the vendors of the 2nd defendant under Ext. D2 in respect of a shed standing on this 22? cents. Exts. P. 5(k) to P. 5(p) are only tax receipts in respect of items 8 and 9. These receipts are hardly documents of title, and, while it might be said that Exts. P. 5(h), P. 5(w) and P. 5 (j) are documents of title in respect of a third of item No. 8 they are not the documents by which the mortgagor the 2nd defendant, got title to the property. She got title to the whole of item 8 by Ext. D2. That deed was never deposited with the plaintiff bank, but was on the contrary handed over to the 3rd defendant bank on the execution of Ext. D1. And so far as item No. 9 is concerned no document of title whatsoever was deposited with the plaintiff bank.

24. The question is whether there was any mortgage at all in favor of the plaintiff bank in respect of items 8 and 9. The question arises only with regard to the 22? cents of land in item No. 8 covered by Exts. P. 5(h), P. 5(w) and P. 5(j). For the rest, as we have seen, no title deeds were deposited with the plaintiff bank. Ext. P. 5(h), dated 9th Makaram 1096 (21st January 1921) is a deed by which Pailee, the original owner of the entire 66? cents comprised in item No. 8 settled 22? cents out of this on his daughter Anna and her husband Mathai. After Mathai's death, Anna and her children usufructually mortgaged this property under Ext. P. 5(w), dated 12th Thulam 1118 (28th October 1942) to one Joseph, but by Ext. P. 5(j), dated 10th Karkitakam 1119 (25th July 1944) they obtained a release from Joseph of his rights under the mortgage. The sale under Ext. D2, dated 27th Chingam 1120 (11th September 1944) to the 2nd defendant was of the whole of item 8, and it was by Pailee and his daughter Anna and the latter's children. So, while it might be said that Exts. P. 5 (h), P. 5(w) and P. 5(j) are

documents of title of the portion of item No. 8 covered by them, they were certainly not the deeds by which the 2nd defendant acquired title to any portion of that item. The deed, Ext. D2, by which she acquired title she did not deposit with the plaintiff bank, but handed over to the 3rd defendant bank at the time of the mortgage, Ext. D1, and the question is whether the deposit of the deeds, Ext. P. 5(h), P. 5(w) and P. 5(j) with the plaintiff bank created any mortgage rights in respect of the 22½ cents covered by those deeds.

25. In my view it did not. It is no doubt true that Section 58(f) of the Transfer of Property Act relating to mortgage by deposit of title deeds is derived from the English law of equitable mortgage. But, in construing this provision, I do not think that we are bound by the principles of equity as laid down in the English decisions on the matter. English courts have worked out the concept of an equitable mortgage by regarding it as a mortgage that has not been perfected, an executory assurance which courts of equity will, as between the parties, treat as an actual assurance. But, so far as the law in India is concerned, the matter is governed by statute which must be construed according to its tenor and context. Reading Section 58(f) of the Transfer of Property Act by itself, the first impression one gets is that the deposit must be of documents of the mortgagor's title notwithstanding that there is no "his" between "of" and "title" in the clause,

delivers to a creditor or his agent documents of title to immovable property,

appearing in the section. On a literal construction perhaps the clause could mean, documents of anybody's title to the property, but surely the law would not contemplate the creation of any mortgage whatsoever by the deposit by one person of the title deeds of another, even if it be that the mortgage would not bind that other. In my view the deposit must be of documents showing title in the mortgagor.

26. The scheme of the Transfer of Property Act as of the Registration Act is that generally speaking, all dealings with immovable property must be by registered instrument; and, this is intended for the protection not merely of the parties to the transaction, but of others who might wish to buy or otherwise acquire any interest in the property. When an exception is made to this general rule as in the third paragraph of Section 54, in Section 58(f), in Section 59 and in the second paragraph of Section 107 of the Transfer of Property Act, the law insists that the transfer should be accompanied by delivery of the property concerned, or of documents of title to the property. And this I think is not merely for the purpose of providing tangible evidence of the transfer (which indeed could be furnished by an unregistered writing) but also for the purpose of putting any person intending to deal with the property on notice of the transfer. Secret transfers are discountenanced so that any person making due enquiry might be able to ascertain in whom title actually resides. Hence the insistence on registration or, in the excepted cases, at least of delivery of the property or the title deeds thereof, so that the absence of possession in the transferor or his failure to produce his title deeds might put the transferee on due enquiry. I do not think

that the Transfer of Property Act could possibly contemplate the creation of successive mortgages of the same property by the same person by the deposit, one after another, of the documents of title, which may be numerous, with nothing to show their sequence in point of time for the purpose of determining priority (except the word of the interested parties or, in case there is a writing in the shape of a memorandum, a writing which can be passed by the mortgagor at any time with any date he chooses to put to it) and no means by which a mortgagee can ascertain the existence or otherwise of a prior mortgage excepting the assurance of the mortgagor. Even if it be that the mortgagee holding the deed by which the mortgagor acquired title can claim priority u/s 78 of the Transfer of Property Act, there would still be nothing by which the priority of the remaining mortgagees could be determined.

27. The view I am taking was taken in Venkataramayya Pantulu v. Narasinga Row (21 M. L. J. 454) and V. E. R. M. A, R, Chettiar Firm v. Ma Joo Teen (A. I. R. 1933 Rang. 299) the latter of which contains a full discussion of the subject and attempts a reconciliation with the English authorities. Official Assignee v. Basudevadoss (A. I. R. 1925 Mad. 723), Surendra Mohan Rai Choudhury Vs. Mohendra Nath Banerjee and Others, , Chidabaram Chettiar v. Aziz Meah (A. I. R. 1938 Rang. 149 F. B.) and S.Rm.M.Rm. Ramanathan Chettiar late a minor by guardian Muthayi Achi alias Chittal Achi and Another Vs. His Highness Maharana Shri Dowlat Singjee, Thakore Sahib of Limbdi represented by his agent Mr. V.C. Gopalaratnam, Advocate, High Court and Others, which have favored the contrary view, namely that:

in order to create a valid mortgage by deposit of title deeds u/s 58(f) of the Transfer of Property Act, it is not necessary that the whole, or even the most material of the documents of title to the property should be deposited, nor that the documents deposited should show a complete or good title in the depositor.

and that:

It is sufficient if the deeds deposited bona fide relate to the property or are material evidence of title or are shown to have been deposited with the intention of creating a security thereon;

have merely purported to follow the English cases.

28. Issue 6 - Priority is claimed by the 3rd defendant bank on three grounds:

(1) That on 7th April 1950, before the suit mortgage which was on 26th November 1957, it had attached items 1, 3, 4, 5, 6, 8 and 9 of the plaint properties before judgment in a suit (O. S. 53 of 1950 of the Alleppey District Court) it had filed for money due from defendants 1 and 2, and that it was partly to discharge the decree it obtained in that suit that the mortgage Ext. D 1 dated 14th May 1958 was executed in its favor by defendants 1, 2 and 4. The attachment would no doubt have availed the 3rd defendant were it executing that decree, but, having taken a mortgage in satisfaction thereof, I am at a loss

to understand on what principle of law it can say that its mortgage should date back to the date of the attachment.

(2) That there was gross negligence on the part of the plaintiff bank and that therefore the 3rd defendant is entitled to priority u/s 78 of the Transfer of Property Act. The negligence can be only in respect of items 8 and 9 where the deeds by which the 2nd defendant acquired these items were not deposited with the plaintiff, but were, on the other hand, handed over to the 3rd defendant. (With regard to the remaining items, negligence or worse was on the part of the 3rd defendant). But since I have held that no mortgage whatsoever was created in favor of the plaintiff in respect of these items no question of priority arises.

(3) That, in respect of the 4th defendant's share in item 3 of the plaintiff properties (wrongly mentioned as items 3 and 4 in the 3rd defendant's written statement) the 3rd defendant has priority by reason of the fact that the 4th defendant was a party to its mortgage, Ext. D1, but was not a party to the mortgage in favor of the plaintiff. But, there being no mortgage by the 4th defendant in favor of the plaintiff, this is not a question of priority at all, but of paramount title which, as I have already stated, I am not deciding.

29. I find that the 3rd defendant bank has no priority.

30. Issue 8:- The evidence of D. W. 2 and the statement of account Ext. D 3 show that the amount due on the mortgage Ext. D1 was Rs. 14, 615.46 as on 30th December 1959. This, in fact, is not disputed. The 3rd defendant is entitled to this sum with interest thereon at 9 per cent per annum from that date.

31. Issues 9 and 10:- In the result there will be decree in favor of the plaintiff for Rs. 58, 610.52 with interest at 6 per cent per annum on that sum from the date of suit and with costs. This will be recoverable from defendants 1 and 2 personally, but recovery as against the 2nd defendant will be limited to the sum of Rs. 35, 000 with interest and costs thereon. It (Rs. 58, 610.52 and interest and costs) will also be recoverable by sale of items 1, 3, 4, 5 and 6 of the plaintiff properties and there will be a preliminary decree accordingly. (Time for payment 3 months). The decree will be in Form 9 in Appendix D of the First Schedule of the Code and will show the sum found under Issue 8 as the sum due to the 3rd defendant as second mortgagee. The 4th defendant will be struck off the party array.