
(1927) 08 MAD CK 0044
In the Madras High Court

Ramanathan Chettiar

APPELLANT

Vs

V. Ry. Sethurama Madige Rao Saheb and Another

RESPONDENT

Date of Decision : 03-08-1927

Acts Referred:

Evidence Act, 1872 — Section 92
Registration Act, 1908 — Section 17(b)

Citation : AIR 1928 Mad 382 : (1928) 27 LW 47

Judgement

1. This appeal is against an order passed by the Subordinate Judge of Tanjore in A.S. 13 of 1926 remanding O.S. 238 of 1924 to the District Munsif, Tiruvadi, for disposal according to law.

2. Defendant 4 is the appellant. The plaintiffs-respondents are the owners of properties described in Schedules A and B of the plaint." On 19th October 1917 they leased the properties in Schedule A to defendant 1 for seven years from 7th July 1918 on a rent of Rs. 600 per annum (see Ex. D) and also executed a mortgage to him for Rs. 1,525, hypothecating the Schedule B properties (see Ex. B, dated 21st November 1918). Ex. B contained the following recital:

Unless credit entry is made herein in respect of payments of amounts which may be made on account of this bond, a statement (Plea) that they have been made otherwise is not sustainable.

3. On the same date as Ex. B defendant executed a varthamanam (Ex. C) to the plaintiffs agreeing to pay Rs. 200 out of the rents for a certain charity, to pay also the cist and to credit the balance of the rents towards the hypothecation bond. The plaintiffs alleged that defendant 1 failed to pay Rs. 200 for the conduct of the charity and the assessment due in respect of the lands and that by crediting the rents as provided for in Ex. C towards the mortgage bond, the bond was fully discharged. On these grounds they instituted O.S. 238 of 1924 for taking accounts in respect of the lease and the mortgage bond, for the recovery of the bond duly cancelled as having been discharged, and also for the balance of rent that may be found by defendant 1 after setting off the amount of the

mortgage bond towards the rents. Defendants 2 to 4 were added as parties as they had got a sub-mortgage over the properties. Without going into the merits of the case, the learned District Munsif held that the varthamanam, Ex. C, is inadmissible in evidence, that it is not binding on defendants 2 to 4, and that the suit as framed was not sustainable in law. He therefore dismissed the plaintiff's suit. On all these points the learned Subordinate Judge differed from the District Munsif and, in the result, remanded the suit for disposal according to law.

4. The points arising for decision are: [1920] 43 Mad. 803 whether the agreement Ex. C is inadmissible in evidence; and (2) whether it is binding on defendants 2 to 4.

5. Point No. 1.-Ex. C is an unregistered document and it provides for the payment of the mortgage debt. The material portion of it is as follows:

...out of the lease amount of Rs. 600 payable by me to you every year I shall pay annually Rs. 200 for the charity and the cist due on the lands and the balance towards the discharge of the mortgage debt

6. It is argued that Ex. C is inadmissible in evidence u/s 92, Evidence Act, and also u/s 17, Clause (b), Indian Registration Act. With reference to Section 92 the argument is that the provision made in Ex. C for the payment of the mortgage debt is in variation of the express terms as regards payment contained in Ex B the mortgage bond. We cannot accept this argument. We do not think that this is a case to which Section 92, Evidence Act, could apply. In the first place, Ex. C is not an oral agreement. It is a written agreement, and further, it cannot be said to be a variation of Ex. B at all. The recital in Ex. B which we have already extracted is to the effect that if actual cash payments towards the discharge of the mortgage debt are made, only these payments endorsed on the bond will be accepted as true payments. This does not by any means prevent the parties from making provision for another method of discharging the mortgage debt. "The mortgage document Ex. B does not state that the discharge of the debt can be made only by making cash payments. If it did contain a statement to that effect, then the provision in Ex. C would be a variation of such a recital. Ex. 0 was executed on the same date as Ex. B. If the parties had intended actual cash payments to be the only method of discharge as is now contended for on behalf of the appellants, then they would not have, with the provision in mind, executed on the same date the varthamanam which provides for a different method of discharge. Even apart from this consideration, construing the terms of Exs. B and 0 we have no doubt that Ex. C. cannot be said to be a variation of Ex. B. The argument that Ex. 0 is inadmissible under Section 92, Evidence Act must therefore be rejected.

7. We should also reject the argument that Ex. 0 is inadmissible in evidence as it is unregistered and as it purports to extinguish the mortgage bond Ex. B. There is nothing in the document to show that the mortgage was actually extinguished by it. As pointed out in *Neelamani Patnik v. Sukaduvu Behari* [1920] 43 Mad.

803 :

there is a clear distinction between a discharge of a debt and the extinguishment of mortgage interest though one may be the result of the other. Where a document in terms only discharges the debt it cannot be brought u/s 17 (b) Registration Act.

8. In view of this reasoning, as Ex. C only provides for the extinction of the mortgage debt we think it need not be registered.

9. Point No. 2. The next point for consideration is whether Ex. C is binding upon defendants 2 to 4, the mortgagees. The law is well settled that

where a mortgage is transferred without the privity of the mortgagor the transferee takes subject to the state of account between the mortgagor and the mortgagee at the date of transfer: see *Dixon v. Winch* [1900] 1 Ch. 736.

10. Dr. Ghose in his book on Mortgages, Vol. 1, p. 353, thus summarizes the result of the English decisions on this point:

As assignee of a mortgage is bound to give credit for all the moneys received by the assignor and if he takes a transfer without enquiring from the mortgagor he does so at his own risk as regards the state of account: see *Mathews v. Wallwyn* 4 Vesay 118; *Parker v. Gierke* [1861] 30 Beavan 54 and *Turner v. Smith* [1901] 1 Ch. 213 ; see also *Neelamani v. Sukadum* [1920] 43 Mad. 803.

11. The rule is the same whether the assignment is by way of transfer of the original mortgage or by way of sub-mortgage: see *Ashburnor on Mortgages*, p. 441, and the cases cited therein. In this case the plaintiffs, the mortgagors, were not consulted by the sub-mortgagees before they accepted the sub-mortgage. If they had done so, they would have known about Ex. C and the arrangement contained for the discharge of the mortgage debt in that document.

A transferee who does not inquire of the mortgagor as to the state of account between the mortgagor and the transferor cannot retain his security as against the mortgagor if in fact the mortgagor has paid off the transferor.... *Turner v. Smith* [1901] 1 Ch. 213.

12. Whatever is equivalent to payment as between mortgagor and mortgagee is good as against the assignee. The decision in *Dixon v. Winch* [1900] 1 Ch. 736 was relied on by the appellant in support of his argument that the sub-mortgagees in this case are not bound by Ex. O. In that case it was held that the payment of the mortgage debt to the mortgagee was not effectual as against the transferee and that the mortgage must be treated as still subsisting in favour of the transferee because the Court of appeal found from the circumstances of the case which showed that the mortgagor and the mortgagee were parties to a deliberate fraud, and that the mortgagor must; be treated as having had notice of the transfer of the mortgage. That decision is therefore inapplicable to the facts of the present case. It is not suggested in this case that the mortgagor had

any notice of the transfer by defendant 1 of the sub-mortgage executed in favour of defendants 2 to 4. In these circumstances we agree with the learned Subordinate Judge that Ex. 0 is binding on defendants 2 to 4. The case therefore must be tried on the merits.

13. The lower Court's decree reversing the decision of the District Munsif and remanding the suit for disposal according to law by the District Munsif is right and this Civil Miscellaneous Appeal is therefore dismissed with costs.