

(1935) 03 MAD CK 0050
In the Madras High Court

S.A. Subramania Ayyar and Others

APPELLANT

Vs

M. Natesa Sastrigal and Others

RESPONDENT

Date of Decision : 11-03-1935

Acts Referred:

Citation : AIR 1936 Mad 113 : 160 Ind. Cas. 686

Hon'ble Judges : Madhavan Nair, J

Bench : Division Bench

Judgement

Madhavan Nair, J.—The plaintiff is the appellant. The second appeal arises out of a suit instituted by the plaintiff for contribution. Six items

of property belonging to the family of defendants 1 and 2 had been hypothecated by them to one Valambal to secure a debt of Rs. 1500 in 1912.

(See Ex. A). In 1913, on one and the same date, namely, 4th June 1913, the mortgagors sold items 1, 2 and 4, and other properties not

comprised in the mortgage of 1912 to the plaintiff (See Ex. B), and item 6 and other properties not included in the mortgage to Valambal, to the

defendant 3 (See Ex. C). These sale deeds were executed to pay off the debt due to Valambal. In Ex. B the plaintiff was directed to pay the

hypothecatee Rs. 625. In Ex. C defendant 3 was directed to pay her a sum of Rs. 1000. Defendants 4 to 7 are alienees from the defendant 3.

Item 3 of the suit properties was claimed by-defendant 9. Item 5 had been mortgaged by defendants 1 and 2 to the father of defendants 10 and

11. There was a suit for sale on foot of that mortgage and in execution of the decree therein that item was purchased by defendants 10 and 11. Ex.

VII is the sale certificate in their favour. Neither the plaintiff nor defendant 3 paid to Valambal the full amounts reserved with them. The plaintiff

paid only Rs. 104-4-0 and defendant 3 paid Rs. 500. As her mortgage was not discharged fully, Valambal instituted O.S. No. 113 of 1919, on

the file of the Principal District Munsif's Court of Tiruvarur to enforce her hypothecation bond and she obtained a decree for sale of these

properties on 3rd September 1919.

2. A final decree was also passed on 9th January 1920. In execution of this final decree the six items of property were brought to sale. To avert

the sale of items 1, 2 and 4 which were first sought to be sold, the plaintiff paid the mortgagee decree-holder the entire amount of the decree,

namely, Rs. 2606-12-0 which eventually benefited the other judgment-debtors also, the defendants in the present suit. Having thus paid the entire

amount of the decree, the plaintiff now seeks to be reimbursed from the defendants in so far as he had to pay more than proportionate liability of

the items purchased by him. In other words, he says that he is liable to contribute towards the mortgage debt only rateably. The plaintiff's claim is

resisted by defendant 3 on the ground that by any kind of valuation he has paid more than what his property is liable to contribute. The defendant 9

resisted the claim by setting up ownership to item 3 in himself as already stated. But it may be mentioned that both the lower Courts found that that

item did not belong to him but belonged to defendants 1 and 2. The main argument of defendants 10 and 11 was that if defendant 3 and the

plaintiff had fulfilled their obligations there would have been no necessity for the mortgagee to sue and so they are not liable. They also contended

that as those items were sold to their father by defendants 1 and 2 free of encumbrance, they had no liability to contribute at all. It may generally be

stated that the contentions of all the defendants were in great measure based upon the plaintiff's undertaking to pay Rs. 625 to Valambal and his

breach thereof in part. The plaintiff based his claim for contribution on Section 82, T.P. Act, which is as follows:

Where several properties are mortgaged to secure one debt, such properties are, in the absence of a contract to the contrary, liable to contribute

rateably to the debt secured by the mortgagee.

3. Prima facie therefore each of the six items involved in the suit would be liable to contribute rateably to discharge the mortgage debt of Valambal.

But the defendants contended that the plaintiff cannot rely on the equitable

principle embodied in this section as there was a contract to the contrary in the present case, namely, the contract in Ex. B that the plaintiff would pay Rs. 625 to the mortgagee. The question for determination therefore was, was there a contract to the contrary within the meaning of Section 82, T.P. Act, the benefit of which could be claimed by the contesting defendants. The District Munsif held that all the items were liable to contribution on the ground that in the circumstances of the case it cannot be said that there was a contract to the contrary within the meaning of Section 82. He therefore passed a decree in favour of the plaintiff making each of the parties concerned liable to pay varying amounts, as mentioned in para. 13 of his judgment. Against this decree defendants 10 and 11, defendant 9 and defendants 4 to 7 appealed. The learned Subordinate Judge-upheld the pleas of the contesting defendants and said that: In my opinion, in the circumstances of the case, I do not think that the plaintiff can successfully argue that when the properties 1, 2 and 4 and property 6 were sold to him and to defendant 3, there was not a contract between himself and the mortgagors to discharge the debt exclusively from out of those properties.

4. Giving effect to this opinion he dealt with the appeals, allowing some of them fully and some in part. In the result the decree of the District Munsif was modified as indicated in the appellate decree. The point for decision in this second appeal is whether there was a contract to the contrary within the meaning of Section 82, T.P. Act, in the present case. In this Court a similar question came up for decision in *Ramabhadrachar v.*

Srinivasa Ayyangar (1901) 24 Mad 85. In that case it was held that the words "contract to the contrary" within the meaning of the section were intended to apply to contracts between mortgagor and mortgagee (the Italics are mine) contracts, for example, under which some of the mortgaged properties were to be liable in the first instance and others were only to be liable in the event of the security of the properties liable in the first instance being insufficient.

5. The learned Judges also pointed out that if the contract relied on will not bind the assignees, the benefit of that contract cannot be availed of by them. The principles enunciated in this decision were accepted as laying down the correct law in *Charan Singh v. Ganeshi Lal* 1926 24 All LJ 401.

In that case, as in the present, a sum of money was left in the hands of a purchaser by the mortgagor, which under the sale-deed dated 19th May

1914 he was bound to use to satisfy the claim of a mortgagee. Both the abovementioned principles were applied by the learned Judges in arriving

at the conclusion that there was no contract to the contrary within the meaning of that section in that case. Referring to Ramabhadrachar v.

Srinivasa Ayyangar (1901) 24 Mad 85 they first pointed out:

It is not pretended that there ever was any contract between Bijai Indar the mortgagor and Mangal Sen his mortgagee that the two properties were

to be liable in any other manner than that contemplated by the section; and neither Sher Singh nor Ganesh Lal as purchaser subsequent to the

mortgage could, as against Mangal Sen, set up a case that the properties were not rateably liable to contribute to his debt.

6. Then they dealt with the plea put forward by Ganesh Lal, the contesting defendant, that by virtue of the term of his purchase from Bijai Indar,

Sher Singh was liable to satisfy the entire mortgage debt of Mangal Sen out of that portion of the purchase money which was left with him for that

purpose. This plea, they held, Ganesh Lal could not raise as he was claiming for himself the benefit of a contract to which he was no party. This

decision was taken up in appeal to the Privy Council and was confirmed by their Lordships in Ganeshi Lal v. Charan Singh 1930 52 All 358

expressing the opinion that the conclusion at which the High Court arrived is correct." Both before the High Court and before the Privy Council, a

decision of the Allahabad High Court in Muhammad Abbas v. Muhammad Hamid (1912) 9 All LJ 499 was relied on in support of the plea that

contribution cannot be claimed in. the case under notice. But that case was distinguished on the ground that in it

there passed to the party from whom the contribution was sought, the benefit of the contract by which the money was to be applied, so that he

could say "I have a contract which frees me from the liability to contribution which the section would otherwise impose on me." No such plea is

available to the appellants in this case. They were not parties to the contract of 19th May 1914 nor has the benefit of that contract passed to them

in law or in equity.

7. Mr. Bhashyam Ayyangar's endeavour on behalf of the respondents has been

to bring the present case within the scope of the decision in Muhammad Abbas v. Muhammad Hamid (1912) 9 All LJ 499. The circumstances of that case were peculiar as pointed out by the learned Judges of the Allahabad High Court. It is not necessary to refer to those special facts. What we have got to see is this : can it be said that in this case the contesting defendants can claim the benefit of the contract between the plaintiff and the mortgagors, defendants 1 and 2. Admittedly there was no agreement between the mortgagors and the mortgagee Valanubal that the properties were to bear the burden of the mortgage in a certain proportion. To the contract between the plaintiff and defendants 1 and 2 in which the plaintiff undertook the obligation of paying off the mortgage, that is Ex. B, the contesting defendants were not parties. The obligation of the plaintiff was purely personal which might be enforced against him by the vendors, but it cannot be enforced by the defendants. In this connexion it was argued on behalf of defendants 10 and 11 that in the mortgage to their father which was enforced by a suit, item 5 was sold free of encumbrances" and that therefore these defendants are not in any way affected by the claims of the previous encumbrancers. Assuming that such a plea can be raised, clearly in this case it is not available to them because their title to the property is based upon the sale certificate and not upon the mortgage and they can get only the rights of auction-purchasers of one of the several items of property charged with a common debt. I may also point out that there is no substance in their plea on the merits. The actual value of the property is found to be Rs. 1000. It was purchased by defendants 10 and 11 for Rs. 351. They must well have known that the property was not free from encumbrances. Further, defendant 10 says in his evidence that "we did not know of the previous encumbrance." It is also a matter for observation that the proclamation of sale has not been filed in the case by defendants 10 and 11. From the above considerations it must follow that the contesting defendants in the present case cannot set up a contract to the contrary within the meaning of Section 82, T.P. Act, in support of their plea that they are not liable to contribute rateably in discharge of the mortgage debt.

8. The two decisions mentioned by the learned Judge cannot in my opinion be relied on to support his conclusion. The decision in Kunchithapaham

Pillai v. Palamalai Pillai 1918 32 MLJ 347 in so far as it is relevant to the particular point argued in this case is, instead of being favourable to the respondents, decidedly against them and supports the appellant's contention. The learned Judges in that case say that the contract to the contrary contemplated by Section 82, T.P. Act is not a contract between the mortgagor and the purchaser of a portion of the property mortgaged. They also say:

We agree that if the benefit of the agreement was expressly assigned in a form which the law requires, a valid defence may be raised. But we are unable to accede to the introduction of equitable grounds on a question settled by the legislature.

9. In view of these observations I cannot understand how the learned Subordinate Judge concluded that the decision in Kunchithapaham Pillai v.

Palamalai Pillai 1918 32 MLJ 347 supported his view. The decision in Veerabhadra Pillai v. Kadambi Ramanuja Iyengar 1927 101 IC 833 must

be confined to its own facts which are somewhat complicated. That was a suit for redemption by an assignee from certain "mortgagors and it was

held that he was bound by the specific terms of the contract entered into between his assignors and defendant 1 in that case which relieved the

latter from his liability to contribute. The decision was based exclusively on the construction of the special contract and no reference has been made

to the relevant cases bearing on the question, what is a contract to the contrary. For the above reasons, following the decisions in Ramabhadrachar

v. Srinivasa Ayyangar (1901) 24 Mad 85 and Ganeshi Lal v. Charan Singh 1930 52 All 358 and accepting the finding that item 3 belongs to

defendants 1 and 2 and not to defendant 9, I must hold, setting aside the decree of the Subordinate Judge, that defendants 4 to 7, defendant 9 and

defendants 10 and 11 are bound to rateably contribute, as held by the District Munsif. But as the decree of the lower appellate Court relating to

defendants 4 to 7 has not been appealed against except as regards interest that portion of the decree will stand. As regards interest, as defendant 3

has really paid more than what is rateably due from him the claim was not pressed. A new decree will be drawn up in the High Court on the above

lines. As regards defendants 9 to 11, the decree of the lower appellate Court will be reversed and that of the Munsif's Court be restored with

costs here and in the lower appellate Court. Defendants 4 to 7 will bear their own costs of this second appeal.