
(1916) 08 MAD CK 0004
In the Madras High Court

Sree Mahant Prayag Doss Jee Varu

APPELLANT

Vs

Ravur Chengama Naidu and Others

RESPONDENT

Date of Decision : 10-08-1916

Acts Referred:

Citation : 37 Ind. Cas. 456 : (1916) 4 LW 477

Hon'ble Judges : Abdur Rahim, O.C.J.; Krishnan, J

Bench : Division Bench

Judgement

Abdur Rahim, Offg. C.J.

1. I agree in the judgment which my learned brother is going to read.

Krishnan, J.—In this appeal we have a case of competition for possession between a first mortgagee who purchased the properties in

execution of his own mortgage-decree against the owner and a second usufructuary-mortgagee, whose mortgage was before the decree and who

was not a party to the 1st mortgagee's suit or decree but who had taken a new usufructuary mortgage after the date of the decree from the owner.

3. The material facts on which the question in this case arises are undisputed and are these. The plaint lands were part of the zemindari of

Karvetnagar. The then Raja and his eldest son executed a simple mortgage-deed, Exhibit A, of the plaint lands in 1877 for Rs. 18,000 in favour of

two persons whose interest is now represented by the plaintiffs. In 1884 the said son who had then become the Raja gave a usufructuary

mortgage, Exhibit I, for Rs. 14,00,000 to the then mahant of Tirupati, whose representative-in-interest now is the defendant, over 194 villages in

the zemindari among which the plaint villages are all included. In 1886 the 1st mortgagees under Exhibit A brought a suit on their mortgage,

Original Suit No. 11 of 1886, against the Raja alone without making the 2nd mortgagee under Exhibit I a party and obtained the usual mortgage-decree for the amount due to them, viz., Rs 37,305 with interest and costs. In 1889 the mortgagee under Exhibit I took a fresh usufructuary mortgage-deed, Exhibit II, from the Raja for a sum of Rs. 19,67,330, being the amount due on his mortgage Exhibit I together with a sum of three lakhs due on another simple mortgage Exhibit VI which the Raja had executed to him at the same time as Exhibit I on certain other properties, as well as an amount due on certain small items of credits and debits between the parties. The properties under Exhibit II were, with the exception of two villages released from the mortgage, the same as in Exhibit I, and included the plaint lands. Plaintiffs got their decree made absolute in 1896 and in execution thereof sold the plaint properties and with leave of Court purchased them themselves in January 1912. The sale was duly confirmed and plaintiffs were put in possession in 1913. Thereupon the defendant applied to the Court to have himself put back into possession on the ground that he was entitled to possession as against the plaintiffs; the Court, agreeing with his contention, directed redelivery of the properties to him and this was carried out. Thereupon plaintiffs brought this suit under Order AXI, Rule 103, of the CPC for the establishment of their right to and for possession as auction-purchasers against the defendant. Defendant's case is that plaintiffs' decree and auction-purchase are subject to his rights under his 1st mortgage-deed of 1884 on which he is entitled to rely against the plaintiffs notwithstanding the execution of Exhibit II and, therefore, the plaintiffs' suit for possession must fail. The learned Advocate-General who appeared for the defendant does not contest the position that his client's rights under Exhibit II are subject to the plaintiffs' rights under their previously obtained mortgage-decree and the sale in execution of it. He contends, however, that he is entitled to rely on Exhibit I as against the plaintiffs in spite of the execution of Exhibit II. Plaintiffs deny this and contend that by the execution of Exhibit II the rights under Exhibit I have been abandoned or extinguished and that defendant can no longer rely on them as they are non-existent.

4. Numerous authorities have been cited before us to show in what cases Courts have held that previous incumbrances paid off or renewed were

to be treated as still kept alive or as extinguished against mesne incumbrancers. The principle deducible from these cases is that the question is really one of intention of the parties to the transaction and where there is no clear evidence of that intention from express declarations or attendant circumstances, parties must be presumed to have intended what is for their benefit; the mere fact that the incumbrance has been paid off or renewed does not decide the question. Their Lordships of the Privy Council laid down these principles in *Gokaldas Gopaldas v. Puranmal Premsukh Vas* 11 I.A. 126 the leading case on the point. They also held in that case that the doctrine enunciated in *Toulmin v. Steere* (186) 3 Mer 20. should not be applied to India and the question should be treated as one of justice, equity and good conscience. The presumption that a man intends to act for his own benefit is so strong that very clear and cogent evidence to the contrary is necessary to replace it. Lord Justice Parker has stated the Result of English authorities in his judgment in *Crosbie-Hill v. Sayer* (1908) 1 Ch 866. thus: "Even in the case of a purchase of an equity of redemption, where the first mortgagee is at the same time paid off and joins in a conveyance of the property to the purchaser, so that questions of merger arise, it will require strong evidence of contrary intention to preclude the Court from holding that the first mortgage-debt is still alive for the purpose of protecting the purchaser of the equity of redemption from mesne incumbrances, whether at the time of purchase he knows of such incumbrances or otherwise. The question in such cases is not whether the purchaser has shewn an intention to keep the security of the first mortgagee alive for his own protection, but whether the Court can gather that he has shewn an intention to merge it for all purposes." His Lordship has also quoted with approval the following observations of Lord Justice Lindley, in the case of *Liquidation Estates Purchase Co. v. Willoughby* (1896) 1 Ch. 726.: "Because in that case (i. e., if the mesne incumbrancer is preferred) the purchaser would not have got what he bargained for, namely, the property free from incumbrances, and it would be manifestly unjust to allow a third party to avail himself of the terms of a deed to which he is a stranger in order to defeat the real intentions of the parties to it. It is on this ground that the Courts have gone a long way, and very properly, to prevent a second or third incumbrancer from obtaining a priority by a mere accident, and at the expense of other people who have

never intended to benefit him." These are the observations in the case of a merger where the presumption of extinguishments is greater and as his

Lordship observes, where there is no question of merger it is easier to hold that the prior incumbrance paid off is kept alive for protecting the

person paying against subsequent incumbrancers. In the case of renewals where the money is not paid off at all but continues charged on the

property, the presumption that the prior mortgage is not extinguished is much stronger. In the case of renewals, Sir Edward Sugden, afterwards

Lord St. Leonards, made the following remarks in *Tennon v. Sweeny* 7 Ir. Eq. R. 511. so long ago as 1844 and they are very pertinent: "Then

another point was started, that as the successive mortgages were for the sums secured by the prior mortgages and for the sums subsequently

advanced, the old securities were merged in the new, and that the judgment-creditor had a right to come in before the last mortgage. That is a very

novel view of the operation of the deeds, I have had considerable experience in this particular department of the law, and I never before heard of

such a doctrine. It is clear that the former mortgages continued untouched and operative notwithstanding the new mortgages." This v. as cited and

followed in *Goluknath Misser v. Lalla Prem Lal* 1 Ind. Dec. 783. where their Lordships held that a mortgagee does not surrender his mortgage or

lower its priority by taking a subsequent mortgage including the same lands with other lands for the same debt and that the question whether the

earlier mortgage is extinguished or not is a question of intention. It was similarly held in *Alangaran Chetti v. Lakshmanan Chetti* 20 M.S 274. that

the execution of a new mortgage-deed in renewal of an earlier one did not extinguish the security under the latter : in that case the argument that the

equitable principle enunciated by the Privy Council in *Gokaldas Gopaldas v. Puranmal Premsukh Das* 10 C.S 1035. was not applicable to

renewals, an argument which was also urged before us, was repelled. In another case which arose on the Original Side of this High Court and was

appealed against, reported as *Yellapaddi Mahalakshammal v. Sriman Madhva Siddhantha Oonahini Nidhi Ltd.* 11 Ind. Cas. 865, it was held that

a mortgagee by deposit of title-deeds who had obtained a mortgage-decree and had taken a fresh mortgage for the decree amount and for further

advance, was still entitled to use his first mortgage against a puisne mortgagee whose deed though subsequent to the date of the former's first

mortgage was before his decree and second mortgage and who had obtained a decree and purchased the property himself, and this

notwithstanding the fact that in his second mortgage there was a statement that his charge and his decree-debt were both extinguished. The learned

Judge on the Original Side observed: The law imputes to a person an intention to act according to his interest. That presumption is made even

when the mortgagee, as in this case, may not have been aware of the circumstances indicating what course of conduct would be for his interest.

The learned Judge also held that an intention to give up his charge against a puisne incumbrancer cannot be imputed in the absence of any

knowledge on his part of that incumbrance." The learned Chief Justice who was one of the Judges who heard the appeal in that case remarked:

The effect of Exhibit O (the second mortgage-deed) was unquestionably to put an end to the plaintiff's subsisting judgment debt against his

mortgagor, but the fact that the debt was extinguished leaves open the question whether the security was put an end to" and following the rulings in

Bhawani Koer v. Mathura Prasad 7 C.L.J. 1. and In re Jennings' Estate 15 Jr. Rep. 277, held that neither the security nor its priority was

defeated by the now deed. The intention has to be inferred not from the facts as they appeared to the persons paying off the prior incumbrance at

the time but from the real facts of the case: see Subramania Pillai v. Palaniappa Madali 21 Ind. Cas. 978.

5. It is not necessary to refer to all the cases cited but I shall refer to one other case, as the facts of that case are somewhat analogous to the facts

in the present case and that is the case of Gopal Chunder Sreemany v. Herembo Chunder Holdar 16 C.D 523. In that case one A had mortgaged

to plaintiff his 1/3rd share in a house in 1882; he again mortgaged the same 1/3rd share to one B in January 1884. Again in May 1884 he and his

two brothers mortgaged the whole house to plaintiff for the money due under the 1st mortgage and a further advance then paid. It was recited in

the deed that the money was borrowed in part to liquidate the debt under the 1st mortgage and that that debt was paid off. The interest charged

under the new deed was different and the property mortgaged, as stated above, had been added to. The mortgage-deed was left with the

mortgagee, but only as one of the title-deeds. Their Lordships held that, looking at what was done in fact, and not to the words, the transaction

was in reality a fresh advance upon fresh security being given for both the old debt and the new advance and upon a fresh arrangement being made

as to interest, that the old security for the old debt remained untouched; and further that, even if it was taken that the old debt was paid off, (hat did

not destroy the security, and that the circumstances referred to above did not show an intention to extinguish the security and that, therefore, it

should be presumed that the security was kept alive for the plaintiff's protection.

6. It is thus apparent from the authorities above cited that Courts in this country have liberally applied the equitable doctrine in question to prevent a

puisne incumbrancer obtaining an unfair advantage of priority and an unjust enrichment of himself by the accident of the prior incumbrance being

paid off or renewed by third parties, which was not intended to benefit him. I, therefore, think that where a subsequent incumbrancer alleges that a

prior incumbrance has been extinguished by payment or renewal, it must be clearly established by cogent evidence, whether direct or inferential,

that the person making the payment or taking the renewed deed, deliberately and with the knowledge that it was to his benefit to keep the prior

incumbrance alive, elected to extinguish it for all purposes; otherwise the presumption that a man intends what is to his benefit should be allowed to

prevail.

7. It is argued that as the plaintiffs were the prior mortgagees in this case and the defendant seeks to have recourse to the equitable doctrine and

rely on his first mortgage only for the purpose of getting rid of the effect of plaintiffs' decree obtained between the dates of the two mortgages, and

not of a mesne incumbrance, the doctrine should not be applied. No case exactly bearing on this question has been cited to us. But there does not

seem to be any reason why the protection granted to persons renewing prior incumbrances against intervening incumbrancers should not be

extended to cases of intervening decrees. By the plaintiffs' decree and the sale in execution thereof the defendant would lose all his rights in the

plaint properties if he is not allowed to rely on his first mortgage.

8. I think the principle does apply to intervening decrees where property has been sold as in this case. I shall now examine the evidence in the case

in the light of the principle I have stated above. A comparison of the two deeds Exhibits I and II shows that there is nothing in the second deed to

justify a finding, as the Subordinate Judge has come to that the defendant has expressly extinguished his rights under the first deed for all purposes

and that he cannot any longer rely on it as against plaintiffs. Apart from the terms of the two deeds there is no evidence of any intention on

defendant's part to abandon his security. In fact the defendant is not shown to have known of the existence of the plaintiffs' decree at the time of

Exhibit II. In paragraph 2 of Exhibit II it is true that some mortgages and decrees are referred to, but there is nothing to show that the reference is

to plaintiffs' decree. The list referred to there is evidently the list of properties we find attached to that document as filed in Court. It is difficult to

see how without knowing of the existence of the decree the defendant could be held to have intended to give up his rights under it as against

plaintiffs. But even if defendant knew of the plaintiffs' decree there is nothing to show that his intention was to abandon his original rights. The very

paragraph referred to indicates that the defendant bargained for a mortgage free of the mortgages and decree-debts referred to therein, as he

stipulates that the mortgagor is to pay them off.

9. Exhibit II recites Exhibit I and purports to be executed for the amount due under Exhibit I with certain other sums added thereto; this is not a

case where the previous debt is paid off. It is true two out of the 194 villages included in Exhibit I are not included in Exhibit II, but this fact cannot

affect the 192 villages on which the amount due under Exhibit I continues charged. The charge on the two released villages no doubt is

extinguished. Under Exhibit I the mortgagee was to have possession for 20 years and if at the end of the period the money was not paid, he was to

continue in possession or after giving six months' notice enforce the personal covenant to pay. See paragraph 19 of Exhibit I. The same possession

is continued under Exhibit II with the difference that the period is increased to 25 years. Though the deed, Exhibit II, says that the properties were

again delivered possession of to the mortgagee by means of it, as pointed out by the Subordinate Judge, the fact is the defendant continued in

possession without any break. No doubt as between the zemindar and the defendant his subsequent possession should be regarded as under the

new deed; and it would be so in the case of every renewal of a usufructuary mortgage. In paragraph 23 of Exhibit II it is the mortgage deed alone

that is cancelled and not the mortgage itself; even the deed is left with the mortgagee though only for reference. There is no doubt a change in the stipulation as to interest, originally interest at six per cent, on Exhibit I and the interest on Exhibit VI were to be paid from the usufruct, the mortgagee keeping accounts; under the new deed the usufruct is to be taken in full satisfaction of the whole interest payable. All these circumstances existed in the case of Gopal Chunder Sreemany v. Herembo Chunder Holdar 8 Ind. Dec. 345. and yet it was held that the substance of the transaction should be looked at and not mere words, that the old deed was not paid off and even if it was, it did not affect the question of the security for the old debt which remained untouched. Following the view taken in that case with which I agree and looking to the substance of the transaction in Exhibit II, it is clear to my mind that it is only a renewal of Exhibit I, that there was no payment of the money due under Exhibit T but that that amount remained charged on the 192 villages still included in Exhibit II and that the latter document is really a continuation of the old security on slightly varied terms.

10. Finding as I do that there is no proof of any intention on the part of the defendant to give up his security under Exhibit 1 and as it is manifestly to his advantage now to rely on it, I must give effect to the presumption that he intended what was to his benefit, and hold that defendant is entitled to rely upon Exhibit I against the plaintiffs' decree and sale under it.

11. It was then argued for plaintiffs that even if defendant is entitled to rely on Exhibit I against them he has abandoned his possession under Exhibit

I and his present possession is under the terms of Exhibit II and as the latter deed is of no avail against them, his present possession under it cannot

be availed of either, as against them. It was also said that the defendant's right to possession under Exhibit 1 was only for 20 years and that period

having now expired, he could not use it against plaintiffs' right to possession. This last argument is erroneous on the facts, as under Exhibit I

defendant can remain in possession at his option until the money-due to him is fully paid off, and that has not been done. It is difficult to understand

the first part of the argument. If defendant is entitled to rely on Exhibit I, as I have held, his right to possession under it must prevail against the

plaintiffs and their claim to possession must fail. It is not his present possession

that the defendant puts forward against the plaintiffs but his right to possession under his first deed. There is no force in the suggestion that right to possession is not part of the security in a usufructuary mortgage-deed and that it is the security alone, meaning thereby the money charge, that is kept alive for the defendant's benefit. In a usufructuary mortgage possession is an essential part of the security; and what is kept alive is not merely the security but the rights of the defendant on the property under the deed.

12. Taking then that the defendant can rely on his rights under Exhibit 1 against the plaintiffs including his right to possession, what is the effect of it on the plaintiffs' present claim for possession? The defendant is in the position of a puisne mortgagee with possession and plaintiffs in the position of first mortgagees who have purchased the property in execution of the decree on their mortgage to which the puisne mortgagee was not a party.

The question whether in these circumstances the suit of the prior mortgagee purchaser for possession should be allowed subject to the second mortgagee's right of redemption or should be dismissed, was considered and decided by a Full Bench of this Court in the case of Mulla Veetil

Seethi v. Achuthan Nair (1911) 1 M.W.N. 165. It was held that a suit for possession failed. Following that decision I hold that plaintiffs' suit must fail.

13. I, therefore, allow the appeal and reversing the decree of the lower Court dismiss the suit and direct the plaintiffs to pay the defendant's costs here and in the Court below.