**(1933) 11 MAD CK 0037**

**In the Madras High Court**

(Sreepada) Ramamurti Guru and Another — APPELLANT

Vs

Bangaru Bulli Rangayya and Others — RESPONDENT

**Date of Decision :** 24-11-1933

**Acts Referred:**

**Citation :** AIR 1934 Mad 268 : (1934) 39 LW 729

**Hon'ble Judges :** Madhavan Nair, J

**Bench :** Division Bench

## Judgement

Madhavan Nair, J.—Fourth defendant is the appellant. The plaintiff''s suit was for the enforcement of the suit mortgage, Ex. A, dated 20th December 1915 executed by the late father of defendants 1 and 2 for himself and as their guardian. In execution of a decree the suit property was purchased by the 3rd defendant''s father in court-sale and defendant 4 got the property so purchased from the 3rd defendant''s father. The sale certificate shows that besides the suit mortgage the property was subject to three other mortgages, one of which was a simple mortgage, Ex. 11, dated-24th March 1914. It is admitted that defendant 4 paid off this mortgage amount. In the suit he claimed priority to the extent of the amount paid by him under the aforesaid mortgage as also the interest thereon from the date of payment at the rate provided for in the bond. The lower Court allowed the priority claimed by him but refused his claim for interest. In the appeal it is contended that the lower Court should have allowed interest on the amount paid by the appellant. A memorandum of objections has been filed by the respondents in which they contend that the lower Court was wrong in allowing in favour of the appellant the priority claimed by him. Taking the appeal and the memorandum of objections together two questions arise for consideration: (1) whether defendant 4 is entitled to priority with respect to the amount paid by him in discharge of Ex. 11; (2) if he is entitled to priority, whether he is entitled to claim interest also on the aforesaid amount. On the question of priority we have no doubt that the lower Court''s decision is right. Having paid the amount due under Ex. 11, the law is well settled that defendant 4 is entitled to keep that encumbrance alive for his own benefit. But it is argued that he being in the position of the Court auction purchaser who has purchased the properties subject to Ex. 11 and the other mortgages, it must be held that he has covenanted with the mortgagor to pay off all the mortgages and the intention to keep the prior mortgage alive for his own benefit must be held to be rebutted by such covenant. In support of this contention reliance is placed on Govindaswamy Thevan v. Doraiswami Pillai (1911) 34 Mad. 119, but that case is-clearly distinguishable because there, the property subject to the mortgages, was sold with an express covenant under which the purchaser undertook to pay off both the mortgages with the purchase money. An auction purchaser who buys property subject to mortgages cannot be considered to case his rights of subrogation. The question is clearly one of intention. In this Court it has been held in Mali Reddi Ayya Reddi v. Gopalahrishnayya AIR 1920 Mad. 389, that the court auction purchaser who purchased the property subject to three mortgages and paid off the second mortgage, is entitled to hold it as a shield against the third mortgagee. The decision in this case has been affirmed by the Privy Council in Mali Reddi Ayya Reddi v. Gopalakrishnayya AIR 1924 P.C. 36. In that case their Lordships of the Privy Council observed:

It is now settled law that where in India there are several mortgages on a property, the owner of the property subject to the mortgages, may, if ha pays of an earlier charge, treat himself as buying it and stand in the same position as his vendor or to put it in another way, he may keep the encumbrance alive for his benefit and thus come in before a later mortgagee.

2. Their Lordships also observed that this rule would not apply if the owner of the property had covenanted to pay the latter mortgage debt, but in the case under consideration there was no such personal covenant. It is therefore clear that an auction purchaser who discharges a prior encumbrance existing on the property in the ordinary course is entitled to claim subrogation with I respect to the amount paid by him. The next point is whether he can also claim interest on the amount. In Mali Reddi Ayya Reddi v. Gopalalcrishnayya AIR 1920 Mad. 389, the case already referred to, this Court allowed the claim of the auction purchaser for interest. The point did not arise for decision before the Privy Council. Mr. Lakshmanna relies on a decision in Ibrahim Sahib v. Arumuga Tayee AIR 1916 Mad. 859, wherein it was held that a purchaser who discharges a prior usufructuary mortgage is not entitled to claim interest on the mortgage amount though the prior mortgage is kept alive for his benefit as against puisne encumbrancer. This case has not been referred to in Mali Reddi Ayya Reddi v. Gopalakrishnayya AIR 1920 Mad. 389, but it is clearly distinguishable, as in the case before us the mortgage discharged by defendant 4 was a simple and not a usufruotuary mortgage, find he is therefore not entitled to remain in possession of the property and realise his interest from its profits. In Mali Reddi Ayya Reddi v. Gopalakrishnayya AIR 1920 Mad. 389 also the prior mortgage discharged by the auction-purchaser was a simple mortgage. The observations in Muthammal v. Razu Pillai AIR 1918 Mad. 108 wherein Ibrahim Sahib v. Arumuga Tayee AIR 1916 Mad. 859 has been considered, also support the contention of the

appellant. On principle, we fail to see why the appellant should not be allowed interest as against the plaintiff. He is only a puisne encumbrancer of the property. In the ordinary course, the plaintiff''s rights in the property can be only subject to the rights of the holder of Ex. 2, the prior mortgagee, who it cannot be disputed will be entitled as against the plaintiff to claim the amount under Ex. 2 together with interest. If this be so, we see no reason why the appellant who steps into the shoes of the mortgagee under Ex. 2 by right of subrogation should also not claim interest on the mortgage amount., For the above reasons the appeal is allowed, and the memorandum of objections is dismissed, both with costs.

 