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**(1935) 03 MAD CK 0055**  
**In the Madras High Court**

Thammana Veerayya

APPELLANT

Vs

Katiga Bibi and Another

RESPONDENT

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**Date of Decision :** 13-03-1935

**Acts Referred:**

**Citation :** AIR 1935 Mad 684

**Hon'ble Judges :** King, J

**Bench :** Division Bench

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## **Judgement**

King, J.—The appellant here had dealings with one Subdarali Beg from the year 1892 and in 1918 brought a suit against Beg's legal representatives which was duly decreed against the assets of Beg in their hands by a decree dated January 1919. Several years before this, that is in June 1914, Subdarali Beg had transferred to his wife by Ex. A the whole of his immovable property subject to a mortgage of 1909. The recited consideration for this transfer was a mahur debt of Rs. 405 due to the wife. There was no provision made in the document for dealing with the debt which was then admittedly due by Subdarali Beg to the present appellant. In 1926 the present appellant filed an execution application for the attachment of certain property which was covered by Ex. A. This was not the whole of the property sold to the wife in 1914 as some portion of it had already been conveyed by her in 1920 in discharge of the mortgage which has already been referred to. That portion of the property was in its turn sold by the mortgagee to the appellant in 1921. The attachment asked for by the appellant was ordered, but on an objection being raised by the widow and her daughter it was set aside. The appellant took the matter up 1 on appeal to the District Court and the order setting aside the attachment was there confirmed and the result is this present second appeal.

2. The findings of the learned lower appellate Court were twofold, firstly, on a question of fact that Ex. A was executed in fraud of the appellant and secondly, a conclusion partly of fact and partly of law that the appellant was precluded by his conduct in taking the sale deed from the mortgagee in 1921, from bringing

forward his present application to proceed in execution against the property covered by Ex. A. On the question of fact some attempt has been made by the learned Counsel for the respondents to argue that there are no findings from which the Court could have drawn the inference that Ex. A was executed in fraud of the appellant. The lower appellate Court points to the fact that debts were clearly due in 1914 by Subdarali Beg and no provision was made for them in Ex. A and to the further fact that by Ex. A the whole of his property was transferred to his wife. There is no clear evidence to show that that property was transferred for any adequate consideration. It is impossible for any one successfully to argue that on those facts the lower appellate Court had not evidence upon which to come to the finding that Ex. A was executed in fraud of the appellant.

3. On the question of law the lower appellate Court argued somewhat as follows: the appellant took from the mortgagee in 1921 a document in which the mortgagee's title as derived from Ex. A was definitely recited; the appellant must therefore by his conduct in taking this sale deed from the mortgagee have ratified the sale, Ex. A. It does not seem to me that this conclusion necessarily follows : whether Ex. A was a fraudulent transfer or a real transfer, it is undeniable that the property was subject to a mortgage and that the mortgage would have to be paid off by the real owner. Whatever may be said about the reference to Ex. A in the recitals of Ex. J, that transaction is one between the appellant and the mortgagee alone. The mortgagee is, so far as the beneficiary under Ex. A is concerned, nothing but an outside party. It seems to me that it is incumbent upon the respondent in this case to show that she has been in some way prejudiced by the action of the appellant in taking the sale deed from the mortgagee before she can possibly succeed.

4. In dealing with this question of election the lower Court refers to two authorities, one in Madras and one in Allahabad. The Madras authority, so far as I can see, contains no reference whatever to this question. The Allahabad authority, *Satchitanand v. Radhapad* 1928 All 234, is directly in point, but it deals with different facts. In that case there was a suit by a plaintiff against defendant 1 and his children, the other defendants. The suit was upon a money claim and in the plaint it was recited that there had been a gift deed in favour of defendants 2 to 7 of certain property belonging to defendant 1 and by virtue of their position as donees under that deed defendants 2 to 7 were impleaded in the suit. The suit went to trial and a decree was given against defendant 1. Subsequently in execution the plaintiff wished to proceed against the property which had been the subject-matter of the gift deed and it was held that he was debarred from so doing because he had already elected to ratify the gift deed; that is to say, the plaint was interpreted as containing an assertion by the plaintiff that the gift deed was a valid one. Here in this case there is no definite assertion "by the appellant at any time that Ex. A was a valid transfer. That does not at all necessarily follow from the mere fact that Ex. A is referred to as the mortgagee's root of title in Ex. J. And in the second place there is nothing in the evidence in this case to show that any communication was ever made by the

appellant to the widow to the effect that he recognized Ex. A as a valid transfer.

5. It seems to me then that on the finding of fact found by both Courts there should not have been this decision based upon an erroneous view of the law, and that the appellant is not precluded by any previous conduct from proceeding in execution against this property. The appeal must therefore be allowed with this reservation that, in so far as both the lower Courts here found that the widow of Sabdarali Beg had a legitimate claim against him for the sum of Rs. 405 as her mahur, the property when brought to sale will be sold subject to a charge for Rs. 405 in the widow's favour. The appellant will have his costs throughout.