
(1957) 01 MAD CK 0004
In the Madras High Court

The Indian Insurance and Banking Corporation, Ltd., by
agent T.P. Gervacise

APPELLANT

Vs

S. Paramasiva Mudaliar and Another

RESPONDENT

Date of Decision : 25-01-1957

Acts Referred:

Transfer of Property Act, 1882 — Section 70, 8

Citation : (1957) 2 MLJ 256

Hon'ble Judges : Rajagopala Ayyangar, J

Bench : Division Bench

Judgement

Rajagopala Ayyangar, J.—The point that is involved in this Letters Patent Appeal, which is directed against the Judgment of the learned

Chief Justice in C.M.A. No. 306 of 1956 is a very short one, namely, as to what passed to a purchaser under a Court sale in execution of the

mortgage decree in O.S. No. 117 of 1949 on the file of the Subordinate Judge of Salem.

2. The appellant before us is the Indian Insurance and Banking Corporation, Limited, Salem. This concern had lent to one Paramasiva Mudaliar

Rs. 45,000 and Rs. 20,000 under two deeds of mortgage, dated nth August, 1947 and 25th March, 1948 respectively. The mortgagor borrowed

this money in order to put up certain constructions on his land bearing Municipal S. No. 222/B/1 in Salem

for housing a cinema theatre. The mortgage of 1948 was a second mortgage on the same security and the description of the security which is

relevant to this appeal ran in these terms:

...and the new tiled building thereon Municipal S. No. 222 -B-1 together with the cinema theatre building being built on items 1 and 2 with

compound walls all round.

3. Money due under the documents was not paid with the result that the mortgagee had to file a suit for the recovery of the amount. This was O.S.

No. 117 of 1949 on the file of the Subordinate Judge of Salem. The suit was decreed on 9th August, 1950 and a preliminary decree was passed

directing the defendant Paramasiva Mudaliar to pay to the plaintiff Rs. 88,000 odd this being the principal and interest due on the two mortgages

together. In default of payment within the time named, the decree directed the sale of the property which was described in the same terms as in the

deeds of mortgage namely,

Municipal S. No. 222-B-1 together with the cinema theatre building being built on dates of suit mortgages and subsequently completed and named

Shanmugha Talkies"" with compound walls all round.

The mortgagor did not pay the decree amount and the property was therefore brought to sale and in the proclamation of sale the property sold

was described in the same terms as in the decree which we have already set out. The mortgagees obtained leave to bid and purchased the

property which was the subject of the mortgages as described in the proclamation of sale and he had to be put in possession, of the property

purchased. Dispute then arose between the purchaser and the judgment-debtor as to what was included in this purchase. The mortgagor had been

using the building which was the security as a theatre and he or his lessee had installed in it the necessary apparatus for that purpose. He had also

furnished it for its use as a theatre. The dispute between the mortgagor and purchaser related to what passed to the purchaser under the sale and

as to whether it included items which had been brought into the premises for the purpose of running a cinema in the building. During the pendency

of the suit a Receiver had been appointed at the instance of the plaintiff because of the allegation that the interest was not duly paid and that the

security was insufficient to pay the mortgages. The Receiver had taken possession of the theatre together with all the moveable properties which

had been brought in by the mortgagor for the purpose of running a cinema in the building. After this purchase, the mortgagor filed an application to

the Subordinate Judge I.A. No. 72 of 1956 for directing a return by the Receiver of the moveable items mentioned in the petition. This was

opposed by the decree-holder purchaser on the ground that some of those had ceased to be moveables and had become part of the building and

therefore passed to him under the Court sale. The learned Subordinate Judge substantially upheld the claim of the mortgagor petitioner and

thereupon the decree-holder filed alternatively a ,Civil Miscellaneous Appeal and a Civil Revision Petition to this Court challenging the correctness

of this order of the Subordinate Judge. This Civil Miscellaneous Appeal and Civil Revision Petition were as stated before heard by the learned

Chief Justice who confirmed the order of the learned Subordinate Judge. It is this decision which is under appeal before us.

4. Mr. Ramamurthi Ayyar learned Counsel for the appellant confined his appeal to two items (1) 94 ceiling boards and (2) 4 exhaust fans. The

rules framed under the Cinematograph Act require that a cinema theatre should have ceiling boards as these improve the acoustics of the building.

The ceiling of the theatre consists of a gable roof covered with zinc sheets but below the gable the ceiling boards have been screwed in a horizontal

plane to angles radiating from the gable supports. The exhaust fans are screwed to apertures made in the walls to receive them. It is common

ground that both the boards as well as the exhaust fans could be removed from the building, that is from the brick and mortar portion without

damage to the structure. The contention strenuously urged by the learned Counsel for the appellant was that what was the subject of mortgages

was not a building simpliciter but a theatre building and that this carried with it a right to claim anything fixed to the building intended for the

permanent enjoyment of the building as a cinema theatre. This argument was rested on the terms of Sections 8 and 70 of the Transfer of Property

Act. We doubt whether Section 8 really applies as the construction was in the course of erection on the date of even the second mortgage and was

completed long after. But this apart, the question for our decision is, can these items we have set out above be treated as accessions to the

mortgage within Section 70 of the Transfer of Property Act. As the tests to determine what passed on a transfer u/s 8 and what is an accession, u/s

70 are not very different, the inapplicability of Section 8 would not much matter for determining the rights of the parties in this appeal. The question

we have therefore to consider is were these items part of the security of the mortgagee under the two deeds. To start with we might mention

merely to put it aside that the English rule as to fixtures does not in terms apply to India. The matter would have to be decided on the intention of

the parties as gathered from the mortgages. It would thus be a question of fact in each case turning on the degree of annexation and the purpose of

the annexation. In this connection we might refer to a passage in the judgment of Varadachariar, J., in Pachigolla Satyanarayanamurthy Vs.

Chavala Gangaya and Others, at 694:

We are prepared to assume that in certain circumstances, machinery existing in the mortgaged premises on the date of the mortgage and even

machinery subsequently installed there may pass under a mortgage of the premises. But the question will, in our opinion, have to be determined in

each case in the light of various facts. It may not be possible always to treat machinery brought into a building as an "accession" within the

meaning of Sections 63 and 70 of the Transfer of Property Act. It may in some cases become necessary to consider how far the definition of the

expression "attached to the earth" in Section 3 of the Transfer of Property Act, will bear upon the decision of this question. According to Clause

(c) of that definition, what is attached must be attached for the permanent beneficial enjoyment of that to which it is attached.

5. Applying this to the facts of the present case we have two factors (1) the degree of annexation namely that the moveable properties are merely

screwed and were not permanently fixed in the sense in which the structure would be damaged if they are removed. (2) Secondly the purpose for

which they were brought into the premises and annexed to the building was not for the use of the building as such but for the use of the building as

a theatre.

6. In this connection the main contention urged by Mr. Ramamurthi Ayyar was as we have already said that what was mortgaged was not a mere

building as such but what was described as a theatre building--a building intended to be used as a theatre and that therefore if the items were fixed

with the intention that they should form a permanent addition to the building as a theatre this would amount to an accession to the mortgaged

property and so part of the mortgagee's security. We are unable to agree with this construction of the mortgage deed. We understand the use of

the word "theatre" preceding the word "building" as intended merely to

identify or as merely descriptive of the premises and not to constitute as the security a theatre in a running condition. If however the latter were the true effect of the documents not merely the items in dispute but even the projector etc., brought into the building in order that the building might be used as a theatre would also form part of the security and would be covered by the same. This certainly is not the contention of the mortgagee. It is in this context that we find it useful to refer to a decision of Kumaraswami Sastriar, J., in A.D. Narayana Sa Vs. Balaguruswami Nadar and Others, . The case before the learned Judge was as to what passed at an execution sale when the properties sold were described as "" distillery buildings door No. 3, Brighton Road, Barracks, Perambur, Madras "". The contention of the purchaser was that pipes, stills and vats which were fixed to the premises when the distillery business was being carried on in it by the judgment-debtors passed to him. The learned Judge rejected this contention and says:

So far as the purchase is concerned, it seems to me to be clear that what was sold was only the distillery buildings. In cases where business is carried on in the premises and the sale is only of the premises and not of the business as a going concern or the premises together with the fixtures or machinery, prima facie all that the purchaser is entitled to are the buildings. It can hardly be the intention of the parties when they sell the buildings alone without reference to the machinery or the business that the purchaser should get the valuable machinery in the buildings by calling them fixtures and by claiming to get them under that head.

7. Adapting the language employed by the learned Judge to the facts of this case, we hold that what was sold was the building and not the theatre as a going concern in which event alone the appellant would be entitled to the items in question and as we have said before, if this were the case he would have been entitled to many more items, in addition.

8. Mr. Ramaswami Ayyangar learned Counsel for the respondent put forward another approach to this question which also appealed to us. He stated that during the currency of the security under the terms of the mortgage deeds, the mortgagee would not be entitled to insist upon the mortgagor continuing to use the building as a theatre. For instance if the mortgagor found the theatre not paying or profitable he could have used it

as a godown or office premises and to this no objection could have been raised by the mortgagee on the ground that this conversion diminished the security. If during the currency of the mortgage, the ceiling boards had been removed or the apertures for the exhaust fans were closed up, the mortgagee could not object, it follows that the items now claimed would not be part of the security as an accession to what was mortgaged. We therefore entirely agree with the judgment of the learned Chief Justice now under appeal.

9. Mr. Ramaswami Ayyangar intimated to us that he had a preliminary objection to the maintainability of the appeal but in the view that we took about the merits of the appeal, we did not hear him on the point.

10. The appeal fails and is dismissed with costs.