

(1935) 03 MAD CK 0039
In the Madras High Court

Thoppai M. Muthiah Bhagavathar and Others	APPELLANT
Vs	
T.V. Venkatarama Ayyar and Others	RESPONDENT

Date of Decision : 01-03-1935

Acts Referred:

Transfer of Property Act, 1882 — Section 82

Citation : AIR 1936 Mad 106 : (1936) ILR (Mad) 121 : 163 Ind. Cas. 977 :
(1935) 42 LW 482 : (1935) 69 MLJ 303

Hon'ble Judges : Venkatasubba Rao, J; Ramesam, J

Bench : Full Bench

Judgement

Ramesam, J.—This Second Appeal originally came on before our brother Jackson, J. After hearing the appeal, he called for a finding. After

the finding was returned, he directed the case to be posted before a Bench. Accordingly it comes before us for disposal.

2. The main facts are not now in dispute. On the 27th January, 1910 the suit properties of which items 1 to 3 belonged to defendants 1 to 5 and

item 4 belonged to one Sundararaja Bhagavathar were mortgaged for Rs. 2,500. Of this sum, Sundararaja took Rs. 816-7-0 and the defendants

drew the rest, viz., Rs, 1,683-9-0. On the 19th May, 1910 the defendants and Sundararaja each paid Rs. 500 towards the mortgage. On the 7th

August, 1910 there was another mortgage of the same properties by the same mortgagors in favour of the same mortgagee for Rs. 600. This

amount was taken by the mortgagors in equal halves. The first defendant paid Rs. 588 on the 14th September, 1912 and Rs. 100 on the 21st

September, 1912 towards the mortgages. The mortgagee filed a suit (O.S. No. 119 of 1916) on the two mortgages and obtained a decree. Item 3

consisted of an othi right in favour of the mortgagors. The original owners of the

property chose to redeem that othi. The amount due on the othi at that time was Rs. 680 and this was paid on the 9th June, 1917 and the third item was redeemed. This payment must also be regarded as a payment by the defendants in partial discharge of their debt due to the mortgagee. In execution of the mortgagee's decree, item 4 was first brought to sale on the 28th April, 1919 and fetched Rs. 1,270. This amount goes in reduction of Sundararaja's share of the debt because item 4 belonged to him. Here it may be mentioned that item 4 had been sold by Sundararaja to the second plaintiff by a sale deed Ex. A, dated the 24th April, 1916 and the second plaintiff deposited a sum of Rs. 1,372-9-0 for setting aside the sale of item 4 and got it cancelled. On the 1st August, 1919, item 1 was sold for Rs. 2,035 and the mortgage debt was completely discharged. Afterwards the second plaintiff sold item 4 to the first plaintiff. On the ground that, taking the value of the various items mortgaged, item 4 is liable to contribute much less than the amount actually realised from Sundararaja, the present suit was filed to recover a sum of Rs. 548-5-6 made up of Rs. 423-5-4 the excess of the proportionate share for which item 4 should be liable and interest at one per cent, per mensem from the date of the deposit. The District Munsif gave a decree for Rs. 482-10-5. In estimating the value of the various items of properties, he fixed 9th June, 1917 as the date on which the valuation should be made for fixing the amount of contribution. There was an appeal by the defendants but it was dismissed by the Principal Subordinate Judge of Madura. Hence this

Second Appeal.

3. When the case originally came on before our brother Jackson, J., he held that the date of the mortgage should be regarded as the date for fixing the proportions to which the various items are liable. As there was then some dispute as to which of the defendants made the payments already mentioned, the learned Judge called for a finding on this matter. He also called for a finding on another issue which runs thus ""Whether the whole mortgage amount should be debited to defendants 1 to 5 as they are the only persons who benefited under the contract"". On the first issue so remitted a finding has been submitted, the effect of which has already been stated by me. On the second issue the District Munsif found that it is not true to say that Defendants 1 to 5 took the whole benefit of the mortgage

money. It must then have been suggested before him by the plaintiffs that there was an agreement between the defendants and Sundararaja on the 12th April, 1912 according to which the defendants undertook to pay the whole debt remaining due under the mortgage bonds, and an agreement Ex. H was produced. At the first trial before the District Munsif when the plaintiffs' vakil attempted to adduce evidence on this matter, it was objected that such a case was not raised in the pleadings and at the original trial further evidence relating to this matter was excluded. But when the finding was called for, the plaintiffs seem to have again relied on Ex. H, and evidence was taken. The defendants' case in reply to Ex. H was that originally there was an arrangement according to which the parties were jointly trading in rubies and the whole balance of the stock-in-trade was to be taken by the defendants and also Sundararaja was to pay them Rs. 400 and in consideration of this the defendants undertook to pay the remaining debt due on the mortgages. But Sundararaja never performed his part of the contract i.e., he never paid any amount and the stock-in-trade was not taken by the defendants. These facts are now found by the District Munsif as pleaded by the defendants. The District Munsif practically found that Ex. H was never acted upon. Apparently this is the reason why Ex. H was not referred to or relied on in the plaint. The plaint proceeded solely on the ground that, with reference to the value of the various items, item 4 was liable only to a particular amount whereas more was realised from the owner of that item. It may be observed that the question relating to Ex. H does not strictly fall within the second issue as drafted by our learned brother Jackson, J. When the finding was returned, Jackson, J. observed that the facts were clear but that the law presented some difficulty. The appellants relied upon *Muthurakku Maniagan v. Rakkappa* (1913) 26 M.L.J. 66. The correctness of this decision was doubted in *Kunchithapatham Pillai v. Palamalai Pillai* (1916) 32 M.L.J. 347 relied on by the respondents. Referring to these two decisions the learned Judge referred the matter to a Bench.

4. In my opinion the decision in *Muthurakku Maniagan v. Rakkappa* (1913) 26 M.L.J. 66 is not correct and it has been rightly dissented from in *Kunchithapatham Pillai v. Palamalai Pillai* (1916) 32 M.L.J. 347. It is inconsistent with the decision of the Privy Council in (1930) L.R. 57 I.A.

189 (Privy Council) But in my opinion these cases have no bearing on the matter before us.

5. Both in the Lower Courts and before Jackson, J., the case seems to have proceeded solely with reference to Section 82 of the Transfer of

Property Act but in my opinion the matter in dispute between the parties cannot be disposed of solely with reference to that section. Where several

properties are mortgaged under a mortgage and afterwards the properties happened to be owned by different persons the question naturally arises

how much share of the debt should be borne by each item which is the same thing as saying how much portion of the debt should be borne by the

owner of each item. In such a plain case there is no difference between the liability of an item of property and the liability of the person owning the

item of property and the decision of the case will naturally turn upon the application of Section 82. But this does not mean that there may not be

other facts which have got to be considered in deciding the question whether one person has any right to recover any amount from another person.

If it is found that he is entitled to recover some amount from the owners of the other items, the question will next arise on what item or items of

property such amount should be charged. The latter question has to be decided with reference to Section 82 of the Transfer of Property Act but it

does not follow that the former question has anything to do with that section. Let us take a simple case in illustration of the above statement.

Suppose two persons A and B mortgage their respective properties together and raise a loan of Rs. 1,000. B's property is worth three times A's

property. The whole loan was taken by A. Afterwards the mortgagee sells B's property and recovers the mortgage amount. Can it be said that B

is entitled to recover only Rs. 250 from A? If we apply Section 82 only, B's property would be liable for three-fourths and A's property would be

liable for one-fourth of the debt but the whole debt was recovered from B's property. So on the principle of that section, B is entitled to recover

only the other one-fourth from A and cannot recover any further amount. Surely this cannot be the law. The truth of the matter is this. Section 82

has solely to do with the distribution of the burden on the properties in a case where no other question as to who had the benefit of the money in

the beginning or similar complication arises. It is easy to give an example of such a case. Suppose a joint family consisting of A and B borrowed

Rs. 1,000 on a mortgage of two items and spent the money for the family expenses. Afterwards the family becomes separate and A becomes the owner of one item and B becomes the owner of another item the value of the items being in the ratio of 3 to 1. If they make no specific contract to the contrary, Section 82 says that B's item must be liable for three-fourths of the debt and A's for one-fourth of the debt, and if more is recovered from one person he will have the right to contribution. Such a case illustrates the application of Section 82 not complicated by any other consideration. In other words that section has solely to do with the distribution of the burden on the items. The question which that section answers is what liability each item is subject to. But on the admitted facts of a case it may be that the owner of one item has no right to recover any amount from the owner of the other item or his only right is to recover a far smaller amount than what the proportion will give. The question how much money one man owes another must be first determined with reference to the transactions between them and after that question is decided one has next to see on which item it can be made a charge with reference to Section 82. For instance, in the first illustration given above, suppose B had paid the whole amount, B is certainly entitled to recover the whole money from A because in the beginning he had not the benefit of any part of the amount borrowed, but if he asks that this amount should be charged he can have a charge only for one-fourth of the amount on A's property because from the beginning A's property was charged only for one-fourth of the debt. The fact that, by reason of Section 82 A's property was subject only to one-fourth of the debt, does not disentitle the plaintiff from recovering the whole amount but it only disentitled him to claim a charge on A's property for a sum in excess of one-fourth of the amount. What is stated above is not inconsistent with the decision in (1930) L.R. 57 I.A. 189 (Privy Council) What was sought to be done by the plaintiff on the equities of that case was to get the benefit of a contract to which he was not a party and the benefit of which was not assigned to him. Similarly in *Muthurakku Maniagan v. Rakkappa* (1913) 26 M.L.J. 66 it cannot be said that the plaintiff stood in the shoes of the mortgagor so as to get the benefit of the contract made with him when the contract was made after his own purchase. But in the case before us we have nothing to do with the question whether one person can get the benefit of a contract between

other persons to which he is not a party. The First question before us is whether the plaintiffs are entitled to recover any amount from the

defendants. Bearing the above principles in mind we find on a calculation that the plaintiffs have paid less than the amount originally drawn by

Sundararaja and they are not entitled to recover any amount from the defendants. It is immaterial for us to consider whether the defendants have

paid more than the amount due by them. As a matter of fact they defended the mortgagee's suit in which Sundararaja did not appear and incurred

costs. Therefore they had to pay the costs and even if they had paid more than their share the point is immaterial for they are not now suing. The

only question before us is whether the plaintiffs are entitled to recover any amount and on an examination of the accounts which it is unnecessary to

set forth in this judgment and it is merely a matter of arithmetic. I find that the plaintiffs are not entitled to recover any amount.

6. The learned Advocate for the respondents drew our attention to a decision in Jai Narain and Others Vs. Rashik Behari Lal and Another . That

decision is a decision of a single Judge. I am unable to agree with that decision as it solely proceeds on Section 82 without considering the question

and ignoring the question raised in that case as to who had the benefit of the amount borrowed. Section 82 is not an authority on the latter question

and does not preclude the Court from enquiring into the latter question. Only after the latter question is decided and the amount due from one party

to the other is ascertained we have to resort to Section 82, and in its application it is true that only contracts between the mortgagors to the

contrary should be attended to and other contracts to which the person seeking contribution is not a party cannot be invoked. I am unable to agree

with that decision.

7. The Second Appeal is allowed and the plaintiffs' suit dismissed with costs throughout.

C.M.P. No. 129 of 1936" is ordered.

Venkatasubba Rao, J.

8. The question to be decided in this case is, whether the first plaintiff's claim to contribution u/s 82 of the Transfer of Property Act can be upheld.

The facts that were admitted in the plaint and regarding which there was no dispute, are the following. Two mortgages were granted in favour of

one Subbier in January 1910 and August 1910 for Rs. 2,500 and Rs. 600 respectively. The mortgages were in respect of 4 items of properties, of which items 1 to 3 belonged to defendants 1 to 5 and item 4 to one Sundararaja Bhagavathar. Each of the two mortgages comprised all the four items; the third item was a mortgage right possessed by the defendants. In 1926, Sundararaja Bhagavathar, the owner of item 4, sold it to the second plaintiff. As already mentioned, in the third item the defendants had only a mortgage right and the owner of that item having deposited in Court the amount due from him, that was adjusted towards the mortgage decree obtained by Subbier. Thereafter items 1 and 4 were caused to be sold in execution of the decree and the second plaintiff, by depositing into Court the necessary amount, got the sale of the fourth item set aside. It may be mentioned that the second plaintiff has since conveyed the fourth item to the first plaintiff and the claim made in the plaint is, that the second item having borne no share of the payment made, it is liable to contribute in the ratio of its value.

9. The District Munsif passed a decree in favour of the first plaintiff for a certain sum, which was upheld by the Subordinate Judge. A second appeal having been filed, it came on before Jackson, J. and on the findings now submitted by the lower Court in pursuance of an order made by him, the following further facts must be taken to have been established—Out of Rs. 2,500 raised under the first mortgage, the defendants received Rs. 1,683-9-0 and Sundararaja Bhagavathar Rs. 816-7-0, and out of the sum of Rs. 600 obtained under the second mortgage, each of them received Rs. 300. As to the respondents, the case stands thus: the defendants paid in cash three sums aggregating to Rs. 1,188; the amount realised by the sale of item 1 was Rs. 2,035; the sum which, as already stated, the owner of the third item paid into Court, was Rs. 680. Thus, the total amount for which the defendants can claim credit, is Rs. 3,903. Similarly, the amount paid in cash by Sundararaja Bhagavathar was Rs. 500 and the amount deposited by the second plaintiff for the setting aside of the sale of the fourth item was Rs. 1,270; that is to say, the aggregate amount contributed by the first plaintiff and his-predecessor is Rs. 1,770. The following two tables show at a glance the proportions of the sums received and repaid.

Rs. A. P.

Amount received Rs. 3,100 The defendants received ..1,983 9 0

The first plaintiff's pre-

decessor (Sundararaja

Bhagavathar) received ..1,116 7 0

Amount repaid Rs. 5,673 The amount the defen-

dants may have deemed

to have contributed ..3,903 0 0

The amount for which the

first plaintiff can take

credit. ..1,770 0 0

10. In the findings submitted, no dates are mentioned showing when the repayments in cash were made; but there seems to be no ground for

doubting the correctness of the statement handed to us by Mr. D. Ramaswami Ayyangar, the defendant's learned Counsel; at any rate, as regards

the dates of the receipts of money subsequent to the decree in the mortgage suit, there can be no dispute. As the amounts paid back by the two

parties in discharge of the debt were on different dates, it stands to reason that in order to equalise payments, interest should be computed from the

dates they were so repaid and on a calculation being made, it is found that the defendants paid back an amount slightly in excess of what was due

by them, having regard to their share of the borrowing; and it follows from this that the payments for which the first plaintiff could get credit, were

slightly short of the sum repayable, having regard likewise to the portion of the loan received by his predecessor.

11. In these circumstances the question arises, has the first plaintiff a valid claim to contribution? The defendants, as shown above, have repaid

more than their share does the rule of contribution enacted in Section 82 require that they should be compelled to pay a further sum? Let us take

an example. A, the owner of property X, and B, the owner of property Y, raise Rs. 1,000 by mortgaging them. The whole amount is received by

A and he himself in due course discharges the mortgage by paying Rs. 1,200, being the debt then due along with interest. Can A claim from B Rs.

600 on the ground, X and Y having been equally worth, are liable to contribute to the debt in the ratio of value?

12. Take yet another example. A is the owner of property X worth Rs. 200; B of Y worth Rs. 800. Both the properties are mortgaged for Rs.

500 and each of the mortgagors receives Rs. 250. The debt with interest in due course amounts to Rs. 600, of which A repays Rs. 300 and B a

similar sum. Can A recover from B Rs. 180 on the ground that although the mortgagors received equal benefit from the loan, A was liable to repay

Rs. 120 only but B Rs. 480, the value of X and Y having been in the ratio of 1 to 4?

13. According to the first plaintiff, the answer in each of these cases should be in the affirmative. That this is contrary to every principle of justice is

obvious; but it is argued that it is the inevitable result of Section 82. I find myself unable to accede to this contention. In the first illustration, B's

position is no more than that of a surety, but it is nevertheless argued that by virtue of Section 82 he is liable to contribute. There can be no

contribution, points out Rashbehary Ghose, if the encumbrance is discharged by the very person who is liable for the debt; in such a case, he

merely pays his own debt as he was bound to do. (Law of Mortgages, 5th Edn., Vol. I, p. 400). To hold that the same result ensues under the

Indian law, one need not resort to any doctrine of equity, for, the right to resist the claim to contribution in such a case, is expressly saved by the

words "'in the absence of a contract to the contrary'" occurring in Section 82. The section deals with the rights of the owners inter se and it would

be proper and natural to infer that the contract referred to is a contract between them, i.e., those liable to contribute and I must therefore dissent,

with great respect, from the view expressed in Ramabhadrachar v. Srinivasa Ayyangar I.L.R.(1900) 24 Mad. 85 that the contract in the section

means only a contract between the mortgagor and the mortgagee. That being so, from the fact that as between A and B, A receives the whole

amount to the exclusion of B, arises the contract (the contract need not be express) that B shall not be liable to contribute; similarly, when each of

them receives an equal moiety, a contract must be implied that they shall bear the burden equally. Moreover, it is well-settled that the right to

contribution is controlled by the right of marshalling, as Sections 56 and 81 of the Transfer of Property Act show. If A, the owner of two estates X

and Y, mortgages them to some person and then sells Y to B, both X and Y, if the principle of contribution is applied, will be liable to contribute

rateably to the debt; but Section 56 says that B is entitled to have the mortgage-debt satisfied out of X so far as it will extend, that is to say, he can

have the assets so marshalled as to throw the mortgage in the first instance on the property not conveyed to him. Again, the right to contribution is

excluded and is prevented from being given effect to by Section 81, which rests upon the principle that a creditor who has the means of satisfying

his debt out of several funds, shall not by the exercise of his right, prejudice another creditor, whose security comprises only one of the funds. The

contention therefore that the right to contribution overrides every other right or equity and that the literal wording of Section 82 compels the Court

to uphold the claim asserted by the plaintiff, is clearly untenable.

14. The question then arises, does the plaintiff stand in a better position than his predecessor-in-title Sundararaja Bhagavathar, the original owner of

the fourth item? There having been a contract to the contrary, I fail to see why it should be within the power of one of the parties to it to deprive

the other of the benefit under it, for the result of taking a contrary view would be, that either party could frustrate the contract by merely assigning

his property. Further, it is somewhat difficult to conceive that one party can at his will thwart the other by enabling his assignee to call in a statutory

right, which ex hypothesi never came into existence by reason of there having been, at the very inception, a contract to the contrary. Moreover,

there is, I think, a short answer to the plaintiff's claim. If he is not bound by his predecessor's contract, it is, I think, but a necessary corollary, that

he should not be permitted to take advantage of a payment by his predecessor. I have said that Sundararaja Bhagavathar made a cash payment of

Rs. 500 and if that sum is excluded, nothing would be due to the plaintiff, indeed, the trial Court's decree in his favour was for a sum less than Rs.

500. The plaintiff's claim, as this fact shows, is inequitable and should not be recognised.

15. (1930) L.R. 57 I.A. 189 (Privy Council) (this is the most accurate report of the judgment of the Privy Council) on which the plaintiff relies,

scarcely helps him. There, a sum of Rs. 32,000 was left with the purchaser of property K, i.e., Sher Singh, the ancestor of the respondents, to

enable him to discharge the mortgage. Perfectly true, but the point to note is, that the appellants, who purchased the other property M, did not pay for an absolute interest in it, but only for the equity of redemption; their Lordships of the Judicial Committee emphasise this aspect in their judgment. Secondly, the sale above referred to in favour of Sher Singh under which he retained Rs. 32,000, was superseded by another sale in his favour and this fact again their Lordships specially notice. The representatives of Sher Singh, who satisfied the mortgagee's claim, claimed contribution from the owner of M, and their Lordships, while holding that the claim was rightly rejected by the High Court, observe:

It would indeed be somewhat surprising if the result were otherwise. The appellants bought subject to the mortgage and paid a price for the property on that footing, and their contention really amounts to this, that having paid for the property on the basis of its being subject to the mortgage they ought now to be allowed to have the benefit of it free from the mortgage. * * *

16. Incidentally I may mention that this case clearly establishes that the contract to the contrary mentioned in Section 82 is, as I have said, a contract inter se between the several owners liable to contribute, for their Lordships' statement that the benefit of the contract did not pass to the appellants, presupposes that the mortgagor, the original party to the contract, could have enforced it against Sher Singh, the other party to it.

17. But to return to the point with which I was dealing, the judgment shows that it would have been inequitable to allow the appellants, who purchased the property M, subject to the mortgage and thus paid only for the equity of redemption, to resist the claim to contribution. I think that is what their Lordships meant when they observed that the benefit of the original contract did not pass to the appellants "'in law or in equity'". I underline the words "'in equity'". It is also significant that their Lordships, while referring to Muhammad Abbas v. Muhammad Hamid (1912) 9 A.L.J. 499 do not disapprove of that decision.

18. There is another case to which I may usefully refer. In Kamta Singh v. Chathurbhuj Singh (1929) ILR 8 Pat. 585 the facts were these. The mortgagors sold a portion of the mortgaged property to the defendants, the conveyance containing a declaration that the title of the vendors was

free from defect and also a covenant that they would make good any loss, should the title prove defective. Subsequently, the mortgagors conveyed a further portion to certain persons referred to as Harbans, for whom the plaintiffs were found to be benamidars; the purchasers did not pay the price but the amount was retained with them for the discharge of the mortgage debt. The plaintiffs paid off the amount due under the mortgage and commenced the suit to recover contribution from the defendants, but their claim was disallowed. It will be seen that as between the mortgagors and the defendants, the sale was not subject to the mortgage and that there was a covenant by the former to make good any loss. Again, so far as the plaintiffs were concerned, they were under a duty, as between them and the mortgagors, to discharge the mortgage debt. Although the contract was in each case with the mortgagors alone and there was no direct contract between the plaintiffs and the defendants, the former's claim to contribution based on Section 82 was negatived. This amounts to holding, that the benefit under the first contract passed to the defendants and likewise, the obligation under the second to the plaintiffs. In my opinion, the conclusion of the learned Judges was right. This case was taken on appeal to the Judicial Committee, but as the judgment of the High Court was confirmed on another ground, the question relating to contribution was not gone into.

19. As regards Jai Narain and Others Vs. Rashik Behari Lal and Another I must, with great respect, dissent from it. There, it was found that the benefit received by the plaintiff and the defendant, who jointly mortgaged their property, was in the ratio of 8 to 1. The plaintiff paid the mortgage amount and claimed contribution. The learned Judge gave him a decree for half the amount paid, on the ground that the property belonged to the mortgagors in two equal moieties. The reasons given by the learned Judge are: (i) there was no contract to the contrary between the mortgagors inter se, (ii) at any rate, the mortgagee was not a party to that contract. As I have said, I must dissent from this decision.

20. In the result, the plaintiff's claim fails and his suit is dismissed with costs throughout.